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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA, A MUNICIPAL CORPORATION, PETITIONER,

vs.

ROYAL INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1948.

CERTIORARI GRANTED DECEMBER 13, 1948.

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Defendant

COMPLAINT—Filed October 29, 1947

1. The plaintiff Royal Insurance Company, Limited, is a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal office and place of business in the City of Liverpool, England. The plaintiff has for many years been, and is now, duly qualified, admitted, and licensed to do business as a foreign insurance corporation in the State of West Virginia.

2. The defendant City of Morgantown, West Virginia, is a municipal corporation organized and existing under the laws of the State of West Virginia, and is the county seat of Monongalia County, West Virginia, located in the Northern District of West Virginia. The defendant is, therefore, a citizen and resident of Monongalia County, in the Northern District of West Virginia.

3. The amount in controversy in this action exceeds, exclusive of interest and costs, the sum of $3,000.00.

[fol. 3] 4. This Court has jurisdiction of the action under the provisions of 28 USCA 41 (1) by reason of diversity of citizenship. The Court also has jurisdiction under the Declaratory Judgment Act, 28 USCA 400.

5. On the 22nd day of March, 1946, the plaintiff, through W. F. Naret, its local agent at Morgantown, West Virginia, wrote and issued to the defendant plaintiff's policy No. 251470, in the amount of $22,000.00, insuring the defendant for a term of one year from March 22, 1946, to March 22, 1947, against loss by windstorm and hail (but not fire) on the so-called "city hangar," located at the Morgantown airport near the City of Morgantown, West Virginia. The

policy was originally written at the premium rate of 15¢ per $100.00, but on May 11, 1946, there was attached to the policy an endorsement noting increase of the rate from 15¢ to 20¢, thereby making the premium rate for the windstorm and hail coverage $44.00 per year, instead of $33.00 per year.

There is attached hereto, as "Exhibit A," a photostatic copy of a portion of the face of said policy No. 251470, bearing upon the peril insured against by said policy. There were attached to policy No. 251470, when written and issued, standard West Virginia endorsements applicable to windstorm and hail policies (as distinguished from fire insurance policies), known as "Tornado Form No. T2" and "Windstorm and Hail Endorsement Clause No. 54."

The windstorm and hail policy No. 251470, issued on March 22, 1946, expired according to its terms on March 22, 1947.

6. At or prior to the time the aforesaid policy No. 251470 expired on March 22, 1947, plaintiff's local Morgantown [fol. 4] agent, W. F. Naret, wrote and issued to the defendant a renewal policy No. 262500 in the amount of $22,000.00 on the said "city hangar." The renewal policy was written in the same amount, at the same premium (i.e., $44.00 for a term of one year), for a like term of one year from March 22, 1947, to March 22, 1948, and with the same Tornado Form No. T2 and Windstorm and Hail Endorsement Clause No. 54, as was the original windstorm and hail policy No. 251470. A photostatic copy of a portion of the face of the said renewal policy No. 262500, showing certain entries thereon bearing on the coverage of the policy, is hereto attached and made a part of this complaint as "Exhibit B." The original policy No. 262500 is in the possession of the defendant.

7. It was the intention of the plaintiff in writing and issuing the renewal policy No. 262500, and of the defendant in receiving, accepting, and retaining it, to effect merely a renewal of the windstorm and hail policy No. 251470. It was not at any time the intention of the plaintiff or of the defendant to enter into a contract of fire insurance, for the insuring of the so-called "city hangar" against loss by fire. The premium chargeable for a fire insurance policy covering the said "city hangar" for a one-year term would have been $1.54 per $100.00, as compared with the premium

rate of 20¢ per $100.00 for the windstorm and hail coverage, so that the total premium for $22,000.00 fire insurance coverage for one year would have been $338.80, instead of $44.00.

8. Notwithstanding the mutual intent of the parties as aforesaid, through the mistake and inadvertence of an office assistant of plaintiff's agent, typewritten entries were made on the face of the renewal policy No. 262500 which misde-
[fol. 5] scribed the intended coverage of the policy, entries of the "amount," "rate," and "premium" being inserted in blank spaces opposite the peril of "Fire and Lightning," instead of the peril of "Windstorm and Hail," all of which appears from the photostatic copy filed herewith as "Exhibit B." The entry of such figures on policy No. 262500 should have been made in the blank spaces opposite the peril "Windstorm and Hail," in accordance with what was done in the original policy No. 251470, as appears in the photostatic copy filed herewith as "Exhibit A." It was never the intention of the defendant to purchase a fire insurance policy, nor of the plaintiff to write such a policy; and the defendant accepted and retained policy No. 262500 believing it to be what it was always intended by the parties to be—i.e., a windstorm and hail policy in renewal of the former policy No. 251470.

9. Neither the plaintiff, nor any of its agents or representatives, nor the defendant ever discovered the mistake made in the writing of defendant's renewal policy No. 262500, until after the fire of August 20, 1947, hereinafter referred to.

10. On the 20th day of August, 1947, the said "city hangar" was destroyed by fire. The building sustained no loss from windstorm or hail.

11. Sometime after the fire of August 20, 1947, the defendant, through its City Manager, Elmer W. Prince, for the first time asserted the claim that the renewal policy No. 262500 was a fire insurance policy, and that it covered defendant's fire loss of August 20, 1947, because of the aforesaid mistake made in the writing of the policy, notwithstanding the clear intent and understanding of the parties at all times prior to the loss that they were making and had entered into a contract of windstorm and hail insur-
[fol. 6] ance, and not a contract of fire insurance. On or

about September 29, 1947, in furtherance of such claim, the defendant submitted to the plaintiff a purported "proof of loss" statement, in which defendant made claim upon the plaintiff for recovery of $22,000.00 under policy No. 262500 for the loss sustained by defendant in the fire of August 20, 1947; and plaintiff is advised and believes, and now avers, that defendant is still claiming a right to recover from plaintiff upon said policy for a fire loss, contrary to the actual mutual intent and understanding of the parties that such policy was to cover only against loss by windstorm and hail, and not against loss by fire.

12. Plaintiff is advised and believes that it is entitled to have its renewal policy No. 262500 reformed and corrected, so as to make it conform to what was at all times the mutual intent and understanding of the parties prior to the fire loss of August 20, 1947—i.e., that it was to be, and was, a windstorm and hail policy, and not a fire insurance policy.

Wherefore, the plaintiff prays:

1. That in conformity with the mutual agreement, understanding, and intent of the parties as hereinbefore alleged, plaintiff's renewal policy No. 262500 be reformed and corrected by the court, so that its terms provide, as the parties mutually intended, for insurance of the city hangar against loss by windstorm and hail only, and not against loss by fire; and that upon being so reformed and corrected, the court adjudge that plaintiff is not liable to the defendant upon policy No. 262500 for the fire loss of August 20, 1947.

[fol. 7] 2. That plaintiff recover its costs against defendant.

October 28, 1947.

James M. Guiher, Donald R. Wilson, Union Bank Building, Clarksburg, West Virginia, Attorneys for Plaintiff.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

[fol. 8] EXHIBIT "A" TO COMPLAINT

1943 Standard Policy
N. C., Va., W. Va.

Agent's Record
ROYAL INSURANCE COMPANY, LIMITED

150 William Street
New York 8, N. Y.

O P

Date Effective	Reins. Company Pol: or Cession No.	Reins. Company Name	Item	Class Number	Amt. Re-ins.	Reins. Premium	Amount Canceled	Return Premium	Original Premium	Ordered By	Reins. Registered

To	Inspt. No.	Ex. Notes	Registered	Cn. Auth.	M'P'D By	App'd By

Space Above For Home Office Use

Renewal of Policy No. New Rate Est. No. Sup. No. Map. Vol. Page Blk. No. St. No.

Peril(s)	Class	Comm.	Amount	Rate	Premium
Fire and Lightning			$		$
Extended Coverage (when end't attached)			.....		$
Windstorm and Hail (when end't attached)			$22,000.00	sub. to rate .15	$ 33.00
			.....		$
Additional Coverages (when endorsement attached)				Total Premium	$ 33.00

for the term of) from the 22nd day of March 1946 (at noon, Standard Time
one year) to the 22nd day of March 1947 (
Insured City of Morgantown, Morgantown, West Va.
Give Full Copy of Written Portion of Policy

MORGANTOWN, W. VA. 49405 O P POLICY No. 251470
Agency at

[fol. 10] SUMMONS AND RETURN

To the above named Defendant:

You are hereby summoned and required to serve upon James M. Guiher and/or Donald R. Wilson, plaintiff's attorneys, whose address is Union Bank Building, Clarksburg, West Virginia, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Wm. C. Howard, Clerk of Court; by Helen B. Shaw Deputy Clerk. (Seal of Court.)

Date October 29, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 10a] Return on Service of Writ

I hereby certify and return, that on November 1, 1947, I received the within summons at Fairmont, West Virginia and on November 3, 1947 at Morgantown, Monongalia County, West Virginia I personally delivered a true copy hereof to Elmer W. Prince, City Manager and Chief Executive Officer of the City of Morgantown, West Virginia, the within-named defendant municipal corporation.

Russell Nichols, United States Marshal, by J. Pietro Repep, Deputy United States Marshal. (Seal.)
Marshal's Fees: Travel $1.90, Service $2.00—$3.90.

U. S. District Court. Filed at Wheeling, W. Va., Nov. 7, 1947. Wm. C. Howard, Clerk.

[Endorsed:] Original, No. Civ. 420-W. District Court of the United States Northern District of West Virginia. Royal Insurance Company, Limited, a corporation, v. City of Morgantown, West Virginia, a municipal corporation. Summons in Civil Action. Returnable not later than 20 days after service. James M. Guiher, Donald R. Wilson, Attorneys for Plaintiff.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER AND COUNTERCLAIM—Filed November 24, 1947

ANSWER

First Defense

The complainant fails to state a claim against defendant upon which relief can be granted.

Second Defense

It is true that plaintiff's local Morgantown agent, W. F. Naret, issued to defendant on or prior to March 22, 1947, plaintiff's policy No. 262500 for the term of one year from March 22, 1947, to March 22, 1948, on the so-called "city hangar", located at the Morgantown airport near the City of Morgantown, West Virginia. The defendant denies that "Exhibit A" and "Exhibit B" are copies of portions of the faces of policies Nos. 251470 and 262500, respectively. Defendant avers that plaintiff's said policy No. 262500 was in fact a policy insuring against the peril of fire and lightning as particularly set forth on the face of plaintiff's said policy, a photostatic copy of which is attached and filed herewith as "Exhibit Policy".

Third Defense

Defendant denies that it was the intention of plaintiff in writing and issuing its policy No. 262500 and of the [fol. 12] defendant in receiving, accepting and retaining plaintiff's said policy to effect merely a renewal of the windstorm and hail policy No. 251470 dated March 22, 1946; and defendant denies that it was not at any time the intention of the plaintiff or of the defendant to enter into a contract of fire insurance for the insuring of the "city hangar" against loss by fire. The intention of the parties, the plaintiff and the defendant, clearly and unambiguously appears from the face of plaintiff's said policy No. 262500. It is true that plaintiff's policy No. 251470 expired according to its terms on March 22, 1947. Plaintiff's said policy No. 262500, dated March 22, 1947, was a new and separate contract of insurance and was not a mere extension or renewal of the former policy No. 251470. Defendant does not know whether or not the correct premium for a fire insurance policy covering the said "city hangar" for a term of one

EXHIBIT "B" TO COMPLAINT

1943 Standard Policy
N. C., Va., W. Va.

Agent's Record
ROYAL INSURANCE COMPANY, LIMITED

150 William Street
New York 8, N. Y.

O P

Date Effective	Reins. Company Pol. or Cession No.	Reins. Company Name	Item	Class Number	Amt. Re-ins.	Reins. Premium	Amount Canceled	Return Premium	Original Premium	Ordered By	Reins. Registered

To	Inspt. No.	Ex. Notes	Registered	Cn. Auth.	M'P'D By	App'd By

Space Above For Home Office Use

Renewal of Policy No. 251470 Rate Est. No. _____ Sup. No. _____ Map. Vol. _____ Page _____ Blk. No. _____ St. No. _____

Peril(s)	Class	Comm.	Amount	Rate	Premium
Fire and Lightning			$ $22,000.00	20 cents	$ 44.00
Extended Coverage (when end't attached)			.....		$
Windstorm and Hail (when end't attached)					$
			.....		$
Additional Coverages (when endorsement attached)					
				Total Premium	$ 44.00

for the term of one year) from the 22nd day of March 1947 (at noon, Standard Time
) to the 22nd day of March 1948 (

Insured City of Morgantown, Morgantown, West Va.
Give Full Copy of Written Portion of Policy

MORGANTOWN, W. VA. 49405 O P POLICY No. 262500
Agency at

year is $1.54 per $100.00, and does not know whether or not the total premium for $22,000.00 fire insurance coverage for one year is $338.80. The defendant did not know the rate for fire and lightning coverage on said hangar, and had the right to assume that the correct amount was indicated in said policy for the coverage designated therein. If the amount heretofore paid by defendant as premium for said policy is incorrect, defendant is willing to and offers to pay any balance due thereon.

Fourth Defense

Defendant denies any mutual intent of the parties to effect any other than the contract of fire insurance clearly set forth on the face of plaintiff's said policy No. 262500. Defendant denies that any mistake or inadvertence of plaintiff, or of its agent, or of its agent's office assistant, could or should be chargeable to or imputed to defendant, or that defendant could in any wise be responsible therefor. Defendant denies that typewritten entries were made on the [fol. 13] face of plaintiff's said policy No. 262500 which misdescribed the intended coverage of the policy. Defendant denies that it was never the intention of the defendant to purchase a fire insurance policy, nor of the plaintiff to write such a policy, and defendant denies that it accepted and retained plaintiff's policy No. 262500 believing it to be a windstorm and hail policy in renewal of the former policy No. 251470.

Fifth Defense

The defendant is a municipal corporation and acts only through its duly elected and appointed officers and agents, its chief executive officer being the City Manager. The practice of the defendant, through its duly authorized officer, the City Manager, is and has always been, for 20 years, at least, to effect and keep in force insurance against fire and lightning on all buildings of the City. Said windstorm policy No. 251470 was issued on March 22, 1946, at the instance of the Acting City Manager during the absence of the City Manager who was then serving in the military forces. The said City Manager, upon returning from military service to his official duties, in connection with making up the tentative budget to be submitted to the City Council for the ensuing fiscal year, required to be submitted at its last session in June, 1947, reviewed the insurance coverages on the properties of the defendant and

EXHIBIT POLICY

STANDARD POLICY

No. 262500

INCORPORATED A D 1845

ROYAL Insurance Company, Limited

STOCK COMPANY

EXECUTIVE OFFICES:
150 WILLIAM STREET

NEW YORK 8,
NEW YORK

PERIL(S)	AMOUNT	RATE	PREMIUM
Fire and Lightning	$ 22,000.	20 cents	$ 44.00
Extended Coverage (when endorsement attached)			$
Windstorm and Hail (when endorsement attached)	$		$
ADDITIONAL COVERAGES (WHEN ENDORSEMENT ATTACHED)			$
		TOTAL PREMIUM	$ 44.00

No insurance attaches in connection with the above listed Perils unless specific "Premium" therefor is specified in the face of this policy (or in endorsements attached hereto).

In Consideration of the Provisions and Stipulations herein or added hereto

and of the above stated **Dollars Premium**

this Company, for the term } from the 22nd day of March, 19 47 } at noon, Standard Time, at

of one year } to the 22nd day of March, 19 48 } location of property involved,

to an amount not exceeding with respect to each peril, the amount specified above in Dollars,

does insure City of Morgantown, Morgantown, West Virginia

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at Morgantown, West Va.

N. O'Connell
United States Manager.

Countersigned
this 22nd day of March, 1947

W. F. Clark Agent

...void if, whether ... after a loss, the insured has wil... concealed or misrepresented any ma... circumstance concerning this insurance or the ... interest, or the interest of the insured therein, or in case ... fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

ATTACH FORM BELOW THIS LINE

Form No. T2

TORNADO FORM—MERCANTILE PROPERTY

(Standard form West Virginia Fire Underwriters' Association)

$ 22,000. On One story Concrete Block with Steel frame and concrete floor building with and rafters roof, and its additions adjoining and communicating, occupied as a Hangar and known as "City Hangar"

including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situated

on City Air Port, near Morgantown, Monongalia County, West Va.

Windstorm and Hail Endorsement clause #54 attached to policy

$ Nothing On store and office furniture and fixtures of every description, including tools, implements, utensils, floor coverings, shades, fuel, stationery and advertising matter; and on such other fixtures as are not insured with building; all while contained in or attached to the above described building and its additions adjoining and communicating.

$ Nothing On stock of merchandise consisting principally of _____

_____

_____

and other merchandise not more hazardous, the property of the insured; and on the interest of the insured in and/or legal liability for similar property belonging in whole or in part to others, and held by the insured either sold but not removed, on storage or for repairs, or otherwise held, all while contained in the above described building and its additions adjoining and communicating.

This policy does not cover on any item hereunder, unless liability is specifically assumed for an amount set opposite thereto then only for this company's pro rata proportion of each item covered, amounting in the aggregate to the total amount of ance under this policy.

Loss, if any, on building only, payable to _____

terest may appear, subject, nevertheless, to all the conditions of this policy.

EXCLUSIONS:—The following property is excluded from coverage under this contract and in case of loss shall not be

$ Nothing On stock of merchandise consisting principally of _____

_____

_____

and other merchandise not more hazardous, the property of the insured; and on the interest of the insured in and/or legal liability for similar property belonging in whole or in part to others, and held by the insured either sold but not removed, on storage or for repairs, or otherwise held, all while contained in the above described building and its additions adjoining and communicating.

This policy does not cover on any item hereunder, unless liability is specifically assumed for an amount set opposite thereto then only for this company's pro rata proportion of each item covered, amounting in the aggregate to the total amount of ance under this policy.

Loss, if any, on building only, payable to _____

terest may appear, subject, nevertheless, to all the conditions of this policy.

EXCLUSIONS:—The following property is excluded from coverage under this contract and in case of loss shall not be sidered in connection with the application of the reduced rate contribution clause: Automobiles, tractors and other self-pelled vehicles; awnings (fabric); radio towers; signs; standpipes; water towers and/or tanks, and their supports; brick, one or concrete foundations, piers or other supports which are below the under surface of the lowest basement floor, or, where ere is no basement, which are below the surface of the ground; cost of excavations, railroad tracks; underground flues, pipes, nduits and drains; nor personal property in which the interest of the insured is not that of entire ownership.

PRIVILEGES GRANTED:—For other insurance without notice until required; to make ordinary alterations and repairs h the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same.

REDUCED RATE CONTRIBUTION CLAUSE—In consideration of the reduced rate and (or) form under which this policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to fifty (50) _____ per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

In the event that the aggregate claim for any loss is both less than Ten Thousand Dollars ($10,000) and less than five per cent (5%) of the total amount of insurance upon the property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

If this policy be divided into two or more items, the foregoing shall apply to each item separately.

Attached to and forming a part of Policy No. 262500 of the Royal _____ Insurance Company of New York

issued at its Morgantown, W. Va. Agency. H. F. Marr Agent (s).

SM-7-44

examined plaintiff's insurance policy No. 262500, dated March 22, 1947, and, believing it to be a policy covering fire and lightning, as set forth on the face thereof, and relying upon the statements on the face of plaintiff's said policy No. 262500, made no request for correction in the coverage and made no provision in said budget for premiums of insurance on said hangar except for the premium covering the renewal of policy No. 262500 upon its expiration on March 22, 1948, whereas he would then, in June, 1947, have [fol. 14] made such correction in coverage and would then, in June, 1947, have secured fire insurance coverage on said hangar had he then known or realized that the policy was intended by plaintiff to cover only windstorm and hail.

The plaintiff having represented to defendant that the coverage on the city hangar was that set forth on the face of plaintiff's policy No. 262500, the plaintiff is thereby estopped from denying any liability under its said policy for the coverage indicated on its face, the responsibility for said representation being chargeable to the plaintiff and to its agents and representatives, and not to defendant.

Sixth Defense

The defendant does not know whether the plaintiff, or its agents or representatives, ever discovered, or made any attempt to discover, the alleged mistake now claimed by plaintiff to have been made by it in writing its policy No. 262500. It is true that the alleged mistake now claimed to have been made by the plaintiff in writing its policy No. 262500, was not discovered by the defendant prior to the fire on August 20, 1947, which totally destroyed the said "city hangar".

Any failure to discover the alleged mistake in said policy is chargeable to plaintiff. It is the plaintiff's duty to see that its policies are written correctly and, when mistakes appear therein, to make the necessary corrections. As defendant is informed and believes, plaintiff maintains facilities for checking policies for mistakes and for reporting mistakes to its agents for corrections. It had ample opportunity prior to the fire of August 20, 1947, to discover the alleged mistake in said policy and to make any corrections necessary so that plaintiff's said policy would reflect the contract of insurance it then intended to make with [fol. 15] defendant, if, as plaintiff now says, its said policy was not correctly written.

During the five months that elapsed between the issuance of plaintiff's said policy No. 262500 and the fire which destroyed said hangar, no notice of any error in said policy was ever given to defendant by plaintiff or by its local agent, nor was any attempt made by plaintiff to correct its said policy. During said five months' period, plaintiff had ample facilities and opportunity to discover any error in its said policy and to correct any such error, and any error in plaintiff's said policy is, therefore, chargeable to plaintiff, and plaintiff is thereby estopped from denying liability under its said policy for the coverage specified on the face of its said policy.

Seventh Defense

It is true that on the evening of the 20th day of August, 1947, the said "city hangar" was destroyed by fire, the loss being total. It is true that promptly thereafter, the next morning, August 21, 1947, the defendant, through its City Manager, gave notice of the loss to plaintiff, through its local agent, and on or about September 29, 1947, filed with plaintiff a proof of loss and claim for the full amount designated in said policy.

Defendant denies that its claim is contrary to the actual mutual interest and understanding of the parties and denies that such policy was to cover against loss by windstorm and hail and not against loss by fire. And defendant denies that plaintiff is entitled to have its policy No. 262500 conformed and corrected to make it conform to plaintiff's claim that said policy was to be a windstorm and hail policy and not a fire insurance policy.

Defendant denies that plaintiff is entitled to recover its costs against defendant.

[fol. 16] Counterclaim

And this defendant for counterclaim against the said plaintiff, Royal Insurance Company, Limited, a corporation, says:

The said plaintiff, Royal Insurance Company, Limited, a corporation, issued to City of Morgantown, West Virginia, a municipal corporation, the counterclaiming defendant, a policy of insurance under date of March 22, 1947, insuring against the peril of fire and lightning for a term beginning March 22, 1947 and ending March 22, 1948, the property described therein as "city hangar," situate on the City Airport

near the City of Morgantown, Monongalia County, West Virginia, in the amount of $22,000.00, the said policy providing that it insures to an amount not exceeding the amount specified above against all direct loss by fire and lightning, and August 20, 1947, the said "city hangar" was totally destroyed by fire; that, by virtue of the policy of insurance, a photostatic copy of which is herewith filed, the said Royal Insurance Company, Limited, owes to the City of Morgantown the sum of Twenty-two Thousand Dollars ($22,000.00), for loss in respect to the property insured by said policy caused by fire on or about August 20, 1947, and it demands judgment herein that said Royal Insurance Company, Limited, do pay unto the said City of Morgantown the said sum, with interest thereon from the date said loss was payable to said City under the terms of the policy of insurance, and its costs against said plaintiff herein.

Arch M. Cantrall, 701 Goff Building, Clarksburg, West Virginia, attorney for defendant and counterclaimant.

Dated November 20, 1947.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of attorneys herein.

Clause No. 54
(R.I. 6/46)

WINDSTORM and HAIL ENDORSEMENT

(West Virginia Standard Form)

(This Endorsement to be attached to Standard Policy when the Perils of Windstorm and Hail are covered thereunder)

The following provisions and stipulations contained in lines numbered 1 to 25 are effective only when this policy is written to insure against the perils of Windstorm and Hail but are not effective when liability is assumed under the Extended Coverage Endorsement:

In consideration of the Windstorm and Hail premium shown on the face of this policy, and subject to the provisions and stipulations set forth below and in this policy, including riders and endorsements added thereto, this policy covers direct loss by Windstorm and Hail to an amount not exceeding the amount of Windstorm and Hail insurance specified on the face of this policy. For the purpose only of this Windstorm and Hail insurance the words "Windstorm and Hail" shall be substituted for the words "Fire, Lightning" as appearing in the Insuring Clause on the face of this policy.

This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form added to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property; (a) grain, hay, straw or other crops outside of buildings, or (b) windmills, windpumps or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Glass Clause: It is expressly stipulated that only such proportion of the Windstorm and Hail insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein, as the value of such glass which is damaged bears to the total value of said building.

The provisions and stipulations elsewhere in this policy relating to increase of hazard, vacancy or unoccupancy shall not apply to the Windstorm and Hail insurance hereunder.

Attached to and forming a part of Policy No. 262500 of the

Royal Insurance Company of New York

issued at its Morgantown, W. Va. Agency.

H. F. Marsh Agent (s).

10M-6-45

[17c - p. 16]

Standard Fire Insurance Policy of the States of North Carolina, Virginia and West Virginia

Expires March 22,1948

Property "City Hanger Bldg"

Windstorm (PERIL COVERED) Amount $ 22,000.00

(PERIL COVERED) Amount $

(PERIL COVERED) Amount $

Total Premium $ 44.00

Assured City of Morgantown,

SEE INSIDE OF POLICY FOR PERILS COVERED

No. 262500

EXECUTIVE OFFICES:
150 WILLIAM STREET NEW YORK 8, N. Y.

W. F. NARET, Agent
Phone 6922 217 High Street
MORGANTOWN, W. VA.

It is important that the written portions of all policies covering the same property read exactly alike If they do not they should be made uniform at once

30952

17

Receipt for Return Premium

To be Signed by the Insured.

Agency 19

Dollars

In consideration of ____ receipt of which is hereby acknowledged, this policy is hereby return premium, canceled and surrendered to the Company.

Insured.

No. of Policy

No. of Renewal

Amount Insured $

YEAR	MONTH	DAY

Date of Cancelation

Date of Policy

Time in force

Premium Paid $

Premium Earned at ____ rate $

Premium Returned $

IF PRO RATA, STATE REASON WHY.

[fol. 18] Due, proper and sufficient service of the foregoing answer and counterclaim on the undersigned Donald R. Wilson, attorney for Royal Insurance Company, Limited, by delivering a copy thereof to said attorney on the 22nd day of November, 1947, at his office in the Union Bank Building, Clarksburg, West Virginia, is hereby accepted this 22nd day of November, 1947.

Donald R. Wilson, Attorney for Royal Insurance Company, Limited.

[fol. 19] In United States District Court

Plaintiff's Answer to Defendant's Counterclaim—Filed December 3, 1947

First Defense

The defendant's counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

Second Defense

Answering the several allegations of the defendant's counterclaim, plaintiff says:

(1) It is true that plaintiff issued to defendant a policy of insurance under date of March 22, 1947, insuring, for a term of one year, in the amount of $22,000.00, the so-called "city hangar" situate near the City of Morgantown, Monongalia County, West Virginia; but notwithstanding anything [fol. 20] to the contrary in the written policy contained, it was the mutual intent, agreement, and purpose of the plaintiff and the defendant, as stated in the plaintiff's complaint herein, that such policy was to be and was a policy of windstorm insurance, and not a policy of fire insurance.

(2) It is true that the said "city hangar" was destroyed by fire on August 20, 1947.

(3) The plaintiff denies each, all, and every one of the other allegations of the defendant's counterclaim herein, except as to the allegations of the counterclaim otherwise answered in (1) and (2) above.

Third Defense

The plaintiff's policy No. 262500 issued to the defendant, upon which the defendant's counterclaim is based, was, notwithstanding anything to the contrary in the written policy contained, mutually intended and agreed by and between the plaintiff and defendant to be a windstorm insurance policy, and not a fire insurance policy; and upon reformation and correction of the written policy to conform to such mutual intent and agreement, as prayed for in the plaintiff's complaint herein, there can be no recovery by the defendant upon the policy.

Fourth Defense

The policy of insurance upon which the defendant's counterclaim is based, when properly reformed and corrected by the Court in accordance with the mutual intent [fol. 21] and agreement of plaintiff and defendant, constitutes a windstorm insurance policy, and not a fire insurance policy. The defendant sustained no windstorm loss, and accordingly there can be no recovery on the policy by the defendant.

Wherefore, plaintiff prays that the defendant's counterclaim be dismissed, with costs.

James M. Guiher, Donald R. Wilson, Union Bank Building, Clarksburg, West Virginia, Attorneys for Plaintiff Royal Insurance Company, Limited.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

Acceptance of Service

The undersigned attorney of record for the defendant City of Morgantown, West Virginia, a municipal corporation, does hereby acknowledge service and acceptance of service of a copy of the foregoing Answer of the Plaintiff to the Defendant's Counterclaim, on this the 1st day of December, 1947.

Arch M. Cantrall, Attorney for Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMAND FOR A TRIAL BY JURY—Filed December 11, 1947

City of Morgantown, West Virginia, a municipal corporation, defendant to complaint of Royal Insurance Company, Limited, a corporation, in above styled proceeding for declaratory judgment, and counter-claimant, demands a trial by jury upon the issues raised by the pleadings, agreeable to Rule of Civil Procedure 38(b).

Dated this 10th day of December, 1947.

Arch M. Cantrall, 701 Goff Building, Clarksburg, West Virginia, attorney for defendant and counterclaimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of attorneys herein.

Due, proper and sufficient service of the foregoing demand for trial by jury on the undersigned attorney for Royal Insurance Company, Limited, by delivering a copy thereof to said attorney on the 10th day of December, 1947, at his office in the Union Bank Building, Clarksburg, West Virginia, is hereby accepted this 10th day of December, 1947.

Steptoe & Johnson, Donald R. Wilson, Attorney for Royal Insurance Company, Limited.

[fol. 23] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL, AND TO TRY CASE WITHOUT A JURY—Filed March 29, 1948

Plaintiff-Royal Insurance Company, Ltd., a corporation, respectfully moves the Court to strike defendant's demand for jury trial served on December 10, 1947, and to set the action down for trial as an equity case before the Court sitting without a jury, for the following reasons:

1. Plaintiff's action against defendant is for the reformation and correction of a written instrument—i.e., an insurance policy. The action is, therefore, purely equitable in character, and is not properly triable before a jury.

2. The action here being of an equitable character, the right of trial by jury does not exist under the Constitution or statutes of the United States.

3. The issue to be tried in this case—i.e., the right of the plaintiff to have the insurance policy reformed and cor-
[fol. 24] rected to conform to the mutual intent and understanding of the parties—is essentially of such character that it should be tried by the Court and not by a jury.

4. As appears from the pleadings, there is no issue of substance involved in defendant's counterclaim against the plaintiff, separate and apart from the issue of reformation; the disposition of defendant's counterclaim depends solely and entirely upon how the issue is determined in plaintiff's suit against defendant for reformation of the policy. The disposition of the reformation issue in plaintiff's action against defendant will be determinative of the counterclaim, so that there are no separate issue or issues to be tried or litigated under the counterclaim.

There is attached hereto, and made a part hereof, plaintiff's memorandum of authorities in support of this motion.

James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Plaintiff.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL AND TO TRY CASE WITHOUT A JURY—Filed April 20, 1948

The defendant, City of Morgantown, West Virginia, a municipal corporation, resists plaintiff's motion to strike said defendant's demand for a jury trial and to set the action down for trial as an equity case before the court sitting without a jury, for the following reasons:

1. Plaintiff's action, while ostensibly for reformation and correction of an insurance policy, is in fact a denial of liability for a total loss by fire and lightning accrued under said policy, the municipal hangar therein insured having been destroyed by fire on August 20, 1947.

2. The plaintiff's remedy by defense to the action on the insurance policy is adequate and complete and, therefore, defendant should not be deprived of its right to trial by jury under the Constitution and Statutes of the United States.

3. The issue herein, an alleged mutual mistake of fact, is one peculiarly suited for determination by a jury and, if this court has a discretion as to whether it will sit as a court of equity in this case, that discretion should not be [fol. 26] exercised in favor of such procedure.

4. The issue to be tried on the counterclaim is a legal issue, viz., liability under a policy of insurance which has become fixed by loss under said policy, and the question raised by plaintiff's action, reformation of the policy to conform to the alleged mutual intent and understanding of the party, is in fact a defense to this claim on the policy, a defense in respect to which no equitable relief is required and right to trial by jury is preserved.

There is attached hereto, and made a part hereof, defendant's memorandum of authorities in support of this resistance of said motions.

Arch M. Cantrall, William G. Stathers, 701 Goff Building, P. O. Box 352, Clarksburg, West Virginia, Attorneys for Defendant and Counter claimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of Attorneys.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER SETTING CASE FOR HEARING WITHOUT A JURY—Filed May 3, 1948

On the opening day of this term, April 20, 1948, came the plaintiff by James M. Guiher, its counsel, and came also the defendant by William G. Stathers, of its counsel; and thereupon the matters arising upon the plaintiff's motion theretofore filed to strike the defendant's demand for jury trial, and to set this case down for trial before the Court sitting without a jury, to which motion of the plaintiff the defendant had theretofore filed its written resistance, was argued by counsel. And the Court, having now maturely

considered the matters arising upon said motion, is of opinion that the said motion of the plaintiff should be sustained. Accordingly it is

Ordered that the plaintiff's said motion to strike the defendant's demand for jury trial, and to set this action down for trial as a non-jury case be, and it is hereby, sustained; and that this action shall be set down for trial before [fol. 28] the Court sitting without a jury on a date to be hereafter fixed by the Court.

Enter on this the 3rd day of May, 1948.

W. E. Baker, United States District Judge.

[fol. 29] In United States District Court

Notice of Appeal to Circuit Court of Appeals—Filed May 15, 1948

Notice is hereby given that City of Morgantown, West Virginia, a municipal corporation, defendant above named, and counterclaimant herein, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the order sustaining plaintiff's motion to strike defendant's demand for jury trial, and to set this case down for trial before the court sitting without a jury, and setting said case for trial before the court sitting without a jury, entered in this action on May 3, 1948.

Arch M. Cantrall, W. G. Stathers, 701 Goff Building, P. O. Box 352, Clarksburg, West Virginia, Attorneys for Defendant and Counter-claimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of Attorneys herein.

[fol. 30] In United States District Court

Stipulation as to Record—Filed May 27, 1948

In order to facilitate the preparation of the record on appeal, the undersigned parties hereby designate the parts of the record and proceedings to be included in the record on appeal, pursuant to Rule 75(f) of the Rules of Civil Procedure:

1. The Summons.

2. The Complaint.

3. The Answer and Counterclaim.

4. Plaintiff's Answer to Defendant's Counterclaim.

5. Defendant's Demand for a Trial by Jury.

6. Plaintiff's Motion to Strike Defendant's Demand for Jury Trial and to Try case without a Jury.

7. Defendant's Written Resistance to Plaintiff's Motion to Strike Demand for Jury Trial and to Try Case without a Jury.

8. The Order Entered Herein on May 3, 1948, from which defendant appeals.

Stipulated and agreed to on this the 20 day of May, 1948. James M. Guiher, Attorneys for Royal Insurance Co., Limited, Plaintiff. W. G. Stathers, Attorney for City of Morgantown, Defendant.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Appellant,

versus

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling.

June 1, 1948, the transcript of record is filed and the cause docketed.

APPEARANCE

June 5, 1948, the appearance of James M. Guiher is entered for the appellee.

[fol. 33] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

NOTICE OF MOTION TO DISMISS APPEAL—Filed June 5, 1948

To Appellant City of Morgantown, West Virginia, a Municipal Corporation:

Notice is hereby given that on Monday, the 28th day of June, 1948, at 10:00 a.m., Asheville Time, at the argument room of the Circuit Court of Appeals in the Federal Building in the City of Asheville, North Carolina, Royal Insurance Company, Limited, appellee herein, will bring on for hearing, before the United States Circuit Court of Appeals for the Fourth Circuit then in regular session sitting, the attached motion to dismiss the appeal in this action.

Dated this the 4th day of June, 1948.

(Signed) James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Appellee.

Steptoe & Johnson, Clarksburg, West Virginia, of Counsel.

[fol. 34] IN UNITED STATES COURT OF APPEALS

[Title omitted]

APPELLEE'S MOTION TO DISMISS APPEAL—Filed June 5, 1948

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Royal Insurance Company, Limited, a corporation, Appellee herein, respectfully moves that this appeal by City of Morgantown, West Virginia, a municipal corporation, Appellant herein, from an order entered by the United States District Court for the Northern District of West Virginia at Wheeling, on May 3, 1948, which appeal was docketed in the office of the Clerk of this Court on June 1, 1948, be dismissed for the following reasons:

1. This is a suit for the reformation of a written instrument—i.e., an insurance policy—and involves no issues [fol. 35] of fact, either in the main action or on the counter-

claim, aside from the purely equitable issue of reformation. The District Court's order of May 3, 1948, appealed from did nothing more than deny a jury trial of such issue, and set the equitable issue down for trial before the Court sitting without a jury. Thus, the order appealed from is wholly interlocutory, and is not a final order from which an appeal can be taken.

2. The order of May 3, 1948, appealed from is not an interlocutory order from which an appeal can be taken under Section 129 of the Judicial Code, 28 *U.S.C.A.* 227.

3. The District Court's order of May 3, 1948, is not an appealable order.

4. The present appeal is premature.

(Signed) James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Appellee.

Steptoe & Johnson, Clarksburg, West Virginia, of Counsel.

[fol. 36] ACCEPTANCE OF SERVICE

The undersigned attorney of record for City of Morgantown, West Virginia, a municipal corporation, appellant herein, does hereby acknowledge receipt and service of copies of the foregoing notice and motion of the appellee to dismiss the appeal herein, on this the 4th day of June, 1948.

(Signed) W. G. Stathers, Attorney for Appellant.

[fol. 37] IN UNITED STATES COURT OF APPEALS

June 10, 1948, the appearance of W. G. Stathers, Arch M. Cantrall and Mary Frances Brown is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

June 12, 1948, brief of appellee in support of motion to dismiss appeal is filed.

June 21, 1948, brief of appellant resisting motion to dismiss appeal is filed.

ARGUMENT ON MOTION

June 28, 1948, (June term, 1948) cause came on to be heard on the motion of the appellee to dismiss appeal before Parker and Dobie, Circuit Judges, and Prettyman, Associate Justice United States Court of Appeals for the District of Columbia, and was argued by counsel and submitted.

[fol. 38] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a municipal corporation, Appellant,

versus.

ROYAL INSURANCE COMPANY, LIMITED, a corporation, Appellee

Appeal for the District Court of the United States for the Northern District of West Virginia, at Wheeling

OPINION— August 31, 1948

Argued June 28, 1948

Before Parker and Dobie, Circuit Judges, and Prettyman, Associate Justice United States Court of Appeals for the District of Columbia.*

[fol. 39] Mary Frances Brown (W. G. Stathers and Arch M. Cantrall on brief) for the appellant, and James M. Guiher (Steptoe & Johnson on brief) for the appellee.

PARKER, Circuit Judge:

This is a motion to dismiss an appeal from an order of the District Court denying a jury trial. The suit was instituted in the court below to reform a policy of insurance on the ground of mutual mistake, the contention of plaintiff being that a policy of insurance, which it had issued on a hangar at an airport, was intended to cover loss by windstorm and hail and premium was paid on that basis but that by mutual mistake the policy was written to cover fire and lightning, which takes a much higher premium. Answer

*Sitting by special assignment.

was filed denying the allegations of the complaint and asking, by way of counterclaim, recovery on the policy for the destruction of the insured property by fire. Defendant filed demand for the trial of the issues before a jury; and from an order denying the jury trial and setting the case down for hearing before the judge, the defendant has appealed. The matter is before us on motion to dismiss the appeal.

The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law. *Clarksburg Trust Co.* v. *Commercial Casualty Ins. Co.* 4 Cir. 40 F. 2d 626, 629; [fol. 40] *Great American Ins. Co.* v. *Johnson* 4 Cir. 25 F. 2d 847, 848; *Toucey* v. *New York Life Ins. Co.* 8 Cir. 102 F. 2d 16, 21.

What we have is a pure case of reformation of a policy on the ground of mistake, a matter of which equity had exclusive jurisdiction under the old practice. *Union Mutual Life Ins. Co.* v. *Mowry* 96 U. S. 544, 547. No distinction exists between reforming the policy as a basis of suit and reforming it for the assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written and parol evidence to add to, alter or deny its terms is not admissible. See *Alleghany Valley Brick Co.* v. *Raymond* 2 Cir. 219 F. 417; *Garage Equipment Co.* v. *Danielson* 156 Wis. 90, 144 N. W. 184; *A. L. I. Restatement of Contracts* vol. 2 sec. 504. The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co.* v. *Saxe*, App. D. C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy at law, *Phoenix Mutual Life Ins. Co.* v. *Bailey* 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties.

Since the issue in the case was clearly one solely cognizable in equity under the old practice, the defendant had no right to a jury trial of the issue as a matter of right under the Rules of Civil Procedure. Rule 38. And even if the order allowing jury trial were appealable, the motion to dismiss might well be allowed on the ground that the [fol. 41] appeal presents no question of substance.

We think, however, that the order is not appealable. The case is not one like *Ettelson* v. *Metropolitan Life Ins. Co.* 317 U. S. 188, or *Enelow* v. *New York Life Ins. Co.* 293 U. S. 379, where an equitable defense was asserted to a law action and the relief asked was in effect that the prosecution of the action at law be enjoined. Here suit in equity has been filed asking the equitable relief of reformation for mutual mistake, and defendant is seeking to have the equitable issue tried before a jury at law and is appealing because the court has denied a motion to that effect. It is true that defendant has filed a counterclaim asking recovery on the policy, and that, if plaintiff's prayer for reformation is denied defendant will be entitled to judgment on this legal counterclaim; but there is nothing in this which makes the denial of jury trial a final order or which can be construed as the granting of an interlocutory injunction against suit on the counterclaim. See *Beaunit Mills* v. *Eday Fabric Sales Co.* 2 Cir. 124 F. 2d 563. There is no reason why any question as to the correctness of the order as to jury trial should not have been presented on appeal from final judgment as was done in the case of *Prudential Ins. Co.* v. *Saxe, supra:* 134 F. 2d 16.

Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing [fol. 42] the course of litigation. We have given short shrift to such dilatory appeals in other cases. See *Bowles* v. *Commercial Casualty Ins. Co.* 4 Cir 107 F. 2d 169 and cases there cited. There is no reason to encourage them by any such forced interpretation of the statute relating to appeals

from interlocutory injunctions as we would have to make to sustain the appeal here.

Appeal Dismissed.

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Appellant,

vs.

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

ORDER OF DISMISSAL—August 31, 1948

This Cause came on to be heard on the motion of the appellee to dismiss the appeal herein, and was argued by counsel.

On Consideration Whereof, It is now here ordered by this Court, for the reasons set forth in the opinion filed herein, that the appeal in this cause be, and the same is hereby, dismissed with costs.

John J. Parker, Senior Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge. E. Barrett Prettyman, Associate Justice, U. S. Court of Appeals for the District of Columbia.

September 27, 1948, petition of appellant for a stay of mandate is filed.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 2, 1948

Upon the Petition of the appellant, by its counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending

the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Chief Judge Fourth Circuit.

October 1st, 1948.

[fol. 45] In United States Court of Appeals

Order Authorizing Clerk to Use Original Transcript of Record In Making Up Record for Use in the Supreme Court of the United States on Application for Writ of Certiorari

Order

For Reasons Appearing to the Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

John J. Parker, Senior Circuit Judge.

January 9th, 1941.

[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 396.

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Petitioner,

vs.

ROYAL INSURANCE COMPANY, Limited

ORDER ALLOWING CERTIORARI—Filed December 13, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(340)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,

Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED

PETITION OF CITY OF MORGANTOWN FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

W. G. STATHERS,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, City of Morgantown, West Virginia, a municipal corporation, respectfully submits its petition for a writ of certiorari to review the order of the United States Circuit Court of Appeals for the Fourth Circuit dismissing an appeal from an order of the District Court for the Northern District of West Virginia. The order of the District Court from which petitioner appealed denied its demand for a jury trial and directed trial of the issues before it as a court of equity.

Summary of the Matter Involved

Royal Insurance Company, Limited, a foreign corporation, instituted an action on October 29, 1947, in the District Court for the Northern District of West Virginia against City of Morgantown, seeking reformation of a fire insurance policy on the ground of mutual mistake. The policy issued by the company insures a city airplane hangar against loss by fire and lightning. Royal Insurance Company, Limited, referred to herein as insurer, sought to reform the policy to insure only against windstorm and hail. The policy was issued on March 22, 1947, and the hangar was totally destroyed by fire on August 20, 1947. The City of Morgantown, referred to herein as insured, promptly filed a proof of loss statement for the full amount stated in the policy. Within the sixty days' limitation against an action by insured to recover on the policy, this action for reformation was instituted by insurer. The insured then filed its answer and counterclaim on the policy. The answer denies the averments of mutual mistake and charges that the insurer is estopped by reason of reliance by the insured upon the policy as written and issued by the insurer. The counterclaim is for recovery on the policy, which claim insured was required to bring into the action under Federal Rules of Civil Procedure, 13(a) for Compulsory Counterclaims. The answer by the insurer to the counterclaim sets up in defense the alleged mutual mistake, which is the basis for its prayer for reformation of the policy in the complaint, and denies the insured's claim on the policy.

The insured filed its demand for a jury trial but, upon motion of the insurer, the demand was stricken by the District Court and the case set down for trial by the court without a jury. The insured appealed to the Circuit Court of Appeals. The insurer moved to dismiss the appeal upon the grounds that (1) the sole issue is equitable, i.e., refor-

mation of a written instrument, (2) the order denying a jury trial is not an interlocutory order within Judicial Code, Section 129, (28 U. S. C. A. 227), (3) the order is not final and not an appealable order.

The Circuit Court of Appeals sustained the motion and dismissed the appeal. The reasons for the dismissal in substance follow the grounds of the motion to dismiss, and are set forth in the written opinion of the Circuit Court of Appeals. (Transcript, page 28.) It is to this order dismissing the appeal that we now seek a writ of certiorari.

Jurisdiction of This Court to Review

Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party. 28 *United States Code*, Section 1254 (1).

An interlocutory order which results in postponement of a trial of a jury action is in substance an order granting an injunction within the meaning of the provisions of Judicial Code, section 129, (since September 1, 1948, Title 28, United States Code, section 1292).

Question Presented

Is the result of the District Court's order postponing a jury trial of the action on the policy in effect an injunction and appealable under Judicial Code, section 129?

Reasons Relied upon for Allowance of Writ

The order of the Circuit Court of Appeals conflicts with the theory and principle of decisions of this court and results in the denial of the constitutional right of jury trial on a legal claim.

The decisions of this Court are distinguished by the Circuit Court of Appeals on grounds of technical differences which have no relation to the theory of the decisions.

A certified transcript of the record has been printed and the required number of copies filed with this petition.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court and that the order herein of said Circuit Court of Appeals be reversed, and for such further relief as to this court may seem proper.

CITY OF MORGANTOWN, WEST VIRGINIA,
A Municipal Corporation,
By Attorney: W. G. STATHERS,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals was delivered on August 31, 1948. It appears in the Transcript, pages 28-31. At the time this brief goes to press it has not been reported.

Statement of the Case

The facts are not involved and require no detailed statement here. They have been fully stated in the Summary of the Matter Involved in the Petition.

Points and Authorities

The order of the District Court has the effect of an injunction and as such is appealable.

Judicial Code, section 129; since September 1, 1948, Title 28, United States Code, section 1292;

Enelow v. New York Life Insurance Company, 293 U. S. 379; 79 L. Ed. 440 (1935);

Adamos v. New York Life Insurance Company, 293 U. S. 386; 79 L. Ed. 444 (1935);

Ettelson v. Metropolitan Life Insurance Company, 42 F. Supp. 488; 317 U. S. 188, 87 L. Ed. 176; 137 F. (2d) 62, cert. den. 320 U. S. 177, 88 L. Ed. 467 (1942).

After loss is incurred under a policy of insurance, the obligation to pay is a legal demand, triable by jury as matter of right.

Federal Rules of Civil Procedure, 38 (a), upon demand, Rule 38 (b), (c);

The Phoenix Mutual Life Insurance Company v. Bailey, 13 Wall. 616, 80 U. S. 568, 20 L. Ed. 501 (1871);

Cable, Adm'x, v. United States Life Insurance Company, 191 U. S. 288, 48 L. Ed. 188 (1903);

Enelow v. New York Life Insurance Company, 293 U. S. 379, 79 L. Ed. 440, 443 (1935);

Prudential Insurance Company v. Saxe, 134 F. (2d) 16, 31-34, cert. den. 319 U. S. 745, 87 L. Ed. 1701 (1943);

Hargrove v. American Central Insurance Company (CCA 10), 125 F. (2d) 225 (1942);

Barnett v. New England Mutual Life Insurance Company (CCA 5), 123 F. (2d) 713 (1941).

The right to trial by jury does not depend upon the nature of the issues or whether raised by complaint or counterclaim but upon whether the remedy at law is adequate.

Cases cited under preceding point, and

Beaunit Mills, Inc. v. Eday Fabric Sales Corporation, (CCA 2), 124 F. (2d) 563 (1942);

1 Moore's Federal Practice, section 13.01, page 672, et seq.;

3 Moore's Federal Practice, section 38.02, page 3013-3015, and supplement thereto.

When reformation in equity would result merely in denial of recovery on the policy and the defense against the policy may be pleaded at law, the remedy at law is adequate.

Wilson v. Queens Insurance Company, etc., 5 Fed. 674 (1881);

United States v. Charles, 74 Fed. 142 (1896);

Raymond v. Toledo, etc. R. Company (Oh. St.), 48 N. E. 1093;

Zuspann v. Roy (Kan.), 170 P. 387;

Mahony v. Standard Gas Engine Company (Cal.), 202 P. 146, syllabus 8, page 150.

A mutual mistake in the drafting of an agreement may be pleaded at common law under the Federal Rules of Civil Procedure, 8(c), and in the State court.

Cases cited under the preceding point, and

Minor's Institutes (Third Edition), Vol. IV, Part II, pages 793, 1334;

Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254, syllabus 1;

12 Am. Jur., Section 125, page 618, under the subject Contracts, "III. Validity: Mistake, Fraud, Duress.";

Federal Rules of Civil Procedure, 8 (c);

Code of West Virginia, Chapter 56, Article 5, Section 5.

Argument

The order of the District Court has the effect of an injunction and as such is appealable under the decisions of this court. (The *Enelow, Adamos* and *Ettelson* cases heretofore cited under Points and Authorities.)

The *Ettelson* case arose after the adoption of the Federal Rules of Civil Procedure and both legal claim and equitable counterclaim were involved in the case. This Court reaffirmed the principle of the *Enelow* and *Adamos* cases, that the order directing a trial of equitable issues by the court in advance of trial of the legal action upon the policy is tantamount to an injunction. The order results in postponement of the jury action on the policy and, in practical effect, may terminate it. The person having the legal claim is in the same position as one who has been restrained by a state court from proceeding in a law action. The *Ettelsbn* case, pages 191-192/ *Judicial Code*, old section 129, new Title 28 United States Code, Section 1292.

After a loss is incurred on a policy of insurance, the obligation to pay is fixed and the sum insured becomes a purely legal demand. *The Phoenix Mutual Life Insurance*

Company v. *Bailey*, 80 U. S. 568, 20 L. Ed. 501; *Cable, Adm'x* v. *United States Life Insurance Company*, 191 U. S. 288, 48 L. Ed. 188; *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 79 L. Ed. 440, 443.

The Circuit Court of Appeals says our case is not one like the *Ettelson* and *Enelow Cases* (Transcript, page 30). True, there are differences, but they are technical differences and do not affect the application of the principle. The first difference mentioned is that we have a legal counterclaim to an equitable claim rather than an equitable counterclaim to a legal claim. Second, the defense to the recovery on the policy is mistake rather than fraud. Do these facts distinguish the cases in principle from the *Enelow* and *Ettelson Cases?*

The denial by this Court of a writ of certiorari to the decision of the United States Circuit Court of Appeals for the District of Columbia, thereby sustaining the opinion of Mr. Justice Rutledge, in the case of *Prudential Insurance Company* v. *Sage*, 134 F. 2d 16, 31-34, cert. denied, 319 U. S. 745 (1943), disposes of the first difference. In that case, the insurance company filed an action to cancel the policy on the ground of fraud one day before the beneficiary instituted an action to recover on the policy. The beneficiary then filed a compulsory counterclaim in the company's action under the Federal Rules (13a). The District Court refused to try the equitable issue, cancellation, separately and before the trial at law on the policy.

It was argued there that the filing of the counterclaim was a waiver of the right to jury trial. The court refused to accept the argument of waiver by compulsion and discountenanced the idea that the right to a jury trial should depend on "a mere race of diligence." Here, even diligence would not avail. The insured was prohibited from bringing suit within sixty days after loss. While that prohibition

was in force, the insurer instituted its action to reform the policy.

Mr. Justice Rutledge says the test is not the nature of the issues but the adequacy of the remedy at law (The *Saxe Case*, page 32). The question is whether the basic issues are such that they can be fully determined without invoking equitable relief. 1. *Moore's Federal Practice*, section 13.01, page 672, *et seq.*; 3 *Moore's Federal Practice*, section 38.02, pages 3013-3015. This test is discussed with apparent approval in *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation* (CCA 2) 124 F. (2d) 563 (1942), cited in Judge Parker's opinion (Transcript, page 30). The *Beaunit Case* turned on the fact that the counterclaim had been dismissed and for that reason there was no issue for a jury trial. See, also, *Hargrove* v. *American Central Insurance Company* (CCA 10), 125 F. (2d) 225 (1942), and *Barnett* v. *New England Mutual Life Insurance Company* (CCA 5), 123 F. (2d) 713 (1941), which involved legal counterclaims to so-called equitable actions on policies of insurance. In each case, the right to trial by jury was sustained.

The Circuit Court of Appeals adopted insurer's contentions that reformation was necessary to relief against the policy and that such relief is exclusive to courts of equity. It was insured's position that the basic issue is the legal claim on the policy and that the defense of mutual mistake, whether legal or equitable, is available as a defense at law in an action on the policy. Reformation is the remedy, not the issue. It is sought here as a means to avoid liability. The same relief would be afforded insurer by a judgment in its favor. Reformation would be a vain and useless procedure. It would result merely in a cancellation or a denial of recovery on the policy. The property insured has been totally destroyed by fire. No other liability can ever be incurred under this policy. In such case, the remedy at law by defense against the policy is complete and adequate. *Wilson*

v. *Queens Insurance Company, etc.*, 5 Fed. 674, and other cases and authorities cited under Points and Authorities.

Reformation is required only where there is a continuing contract under which the parties' rights and future conduct would be governed or where the reformed contract is set up as the basis for other relief. In the fraud cases, represented by the *Enelow* and *Ettelson Cases*, the relief sought was cancellation. It is an equitable remedy also, as is reformation, yet that fact did not enter into the decision. Cancellation was not necessary there to relief against the policies any more than reformation is necessary here. No affirmative relief is necessary to protect the insurer in either case.

Mistake has always been recognized as a defense at law. When set up in avoidance of the contract, it is not necessary to go into equity to reform the contract. (See cases cited under Points and Authorities.) Mistake as a defense at law is classed with that of fraud: Both are often improperly called equitable pleas, says Professor Minor, whose work, *Minor's Institutes*, is the classic on common law pleading in the Virginias. In matters of fraud and mistake courts of law and equity have always exercised concurrent jurisdiction. *Minor's Institutes*, (Third Edition), Vol. IV, Part II, pages 793; 1334. And see cases, texts, statutes and rules cited in Points and Authorities, part of which are quoted in Appendix to this brief. Under Federal practice, prior to the Rules of Federal Procedure providing one form of Action (Rule 2), if the remedy at law was adequate, the court could not take jurisdiction in equity. Title 28, U.S.C.A. 384. Under Federal Rules, 8 (c), defendant may plead affirmative matters, which include duress, estoppel, fraud and "any other matter constituting an avoidance or affirmative defense."

The Circuit Court of Appeals assumed that reformation was necessary to relief. Mistake gives rise to remedies

other than reformation. The only difference between law and equity in matters of mistake depends upon the character of the remedy. Though a bill in equity for rescission might be entertained, a mistake of fact may be set up as a defense to an action at law.

The case of *Union Mutual Life Insurance Company* v. *Mowry*, 96 U. S. 544, 547. 24 L. Ed. 674, cited by the Circuit Court of Appeals, (Transcript, page 29) contains dictum to the effect that, if there had been an issue of mistake, equity only would have jurisdiction to reform. The case did not involve either mistake as a defense at law or reformation. In other cases cited by the Circuit Court, reformation was precedent to other relief, by action on the contract or counterclaim. Such is not the case here, where insurer merely defends against recovery on the policy and denies all right to recover under the contract as written. Judgment for defendant in a court of law has the same practical effect as either reformation or rescission.

Conclusion

This case is not distinguishable in principle from the *Enelow*, *Adamos* and *Ettelson Cases*, merely because the defense is mistake rather than fraud and the ostensible relief is reformation rather than rescission or cancellation.

If piecemeal appeals are to be discouraged as a matter of public policy, it should not be done at the sacrifice of the litigants consfitutional rights. The determination of the kind of trial at this stage will in fact speed the final decision and termination of the litigation. The conclusion of the Circuit Court of Appeals that this is a "dilatory appeal" should be rejected.

The determination now of the right to a jury trial will result in one trial. If left until final judgment, then a second trial may be required and the litigation extended accordingly, with greater expenditure of time and money

to all parties; otherwise if a jury trial is sustained and it is later held that a trial before the court was proper. In such case, the court may find the facts from the record thus already made before the jury.

The claim on the insurance policy being a legal one, and the insurer's remedy by defense at law being full, complete and adequate, the petitioner's right to trial by jury is preserved to him under the Constitution and decisions of this Court.

It is respectfully submitted that the Circuit Court of Appeals erred in dismissing the appeal and that a writ of certiorari should be granted to review its order of dismissal.

W. G. STATHERS,
Attorney for Petitioner.

APPENDIX

"The common law allows no want or failure of consideration, no fraud in the procurement of the contract, no mistake therein, nor any antecedent matter whatsoever, to be brought forward by plea *against a sealed instrument;* * * *.

"Where the contract is *not sealed*, all the circumstances above enumerated may, even at common law, be proved by *way of defense* to the action on the contract, * * *."

Minor's Institutes, Vol. IV, Part II, page 793.

"The jurisdiction of the courts of equity is *concurrent*, more or less, of cases such as, (1) Accident; (2) Mistake; (3) Fraud; * * *."

Minor's Institutes, Vol. IV, Part II, page 1334.

"Generally courts of law and equity have concurrent jurisdiction of causes of action arising out of fraud, accident, or mistake."

Daniels v. *Gillespie*, 65 W. Va. 366, 64 S. E. 254, syllabus 1.

"A mistake which so affects the validity of an agreement as to render it void or voidable may, ordinarily at least, be asserted as a defense in an action at law or in a suit in equity * * *."

12 Am. Jur., section 125, page 618 "Contracts".

"In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, * * * or any other matter, as would entitle him * * * to relief in equity, in whole or in part, against the obligation of the contract; * * *."

Code of West Virginia, Chapter 56, Article 5, Section 5.

"(c) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively * * * estoppel, failure of consideration, fraud * * * and any other matter constituting an avoidance or affirmative defense * * *."

Federal Rules of Civil Procedure, 8(c).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED,
Respondent

UPON PETITION OF CITY OF MORGANTOWN FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

W. G. STATHERS,
Clarksburg, West Virginia,
Attorney for Petitioner.

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Hogg's Pleading and Forms, Fourth Edition (W. Va.), page 294 4
3 *Moore's Federal Practice* (1947 Supplement), Section 39.01, page 33 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED,
Respondent

REPLY BRIEF FOR PETITIONER

Reply to Respondent's "Statement of the Case"

The respondent's description of the policy in this action as a "renewal" policy is misleading. It was in fact an entirely new, separate and distinct contract of insurance. Respondent says that when issued "both parties" intended it "merely as a renewal of the prior windstorm policy," thus implying this to be an established fact. However, this is a point which is put directly in issue by the answer and counterclaim of insured. The statement that the word "Windstorm" was typed on the "front" of the policy is not strictly accurate since the word "front" might be taken to refer to the face of the policy. We believe it is, strictly speaking, typed on the cover or back of the policy. It is

not part of the contract. The insured is cautioned to "See Inside of Policy for Perils Covered" (R. 17).

Respondent undertakes to explain its undue haste in bringing this action by speculating on the possibility that it might be charged with laches if it had not done so promptly. The laches with which respondent is chargeable occurred between March 22, 1947, the date the policy was issued, and the date sometime after August 20, 1947, when the fire occurred. During that time the policy was in force and was to all appearances a policy furnishing insured with fire coverage as set up in its answer (Fifth and Sixth Defenses, R. 9-11). After the fire and insurer's discovery of the alleged mistake, it could have denied liability on the ground of such mistake. This would have put the insured on notice just as effectively as institution of the action.

We do not agree that the "only issue" is mutual mistake. This is perhaps the principal issue, from the point of view of respondent, but there is also the insured's defenses of estoppel (Answer, Fifth Defense, R. 9-10) and negligence on the part of the insurer in not discovering the alleged mistake until after the fire (Answer, Sixth Defense, R. 10-11).

Questions Presented

The appealability question is so intertwined with the right to jury trial that the Court cannot pass on the one without sustaining or denying that right. Thus we assume that the Court must necessarily pass on the substance of our appeal.

Reply to Argument of Respondent

The Basic Issues

Are they legal or equitable? We have never conceived of reformation as other than a creature of equity, historically or otherwise. So far as the complaint only is con-

cerned, the "*sole*" issue is mutual mistake. If respondent stated this issue in these words we would find no point of disagreement. But respondent constantly plays on the word "reformation," which is a remedy and not the issue at all. For example, at page 11 of respondent's brief (hereinafter referred to as R.B.), in this statement—"Petitioner ignores the fact that, as a defense to an action at law, reformation and fraud are not in the same class, • • •." Of course, they are not in the same class and we have never so contended. We agree with respondent that reformation is not a defense either at common law or under "present procedural rules" (R.B. 11). It is a remedy devised by courts of equity in cases where courts of law did not afford relief. Respondent has always insisted upon confusing the issues with the remedies afforded to the complaining party, and it carried the Circuit Court of Appeals down this fallacious path. The point we have questioned is the need for invoking this relief by reformation when a defense—as mistake—is available in an action at law.

With exception of the *Philippines* case (R.B. 9) the respondent's citations are cases where reformation was prerequisite to an action on the contract and not cases where mistake is set up by way of defense. The *Philippines* case was decided under a particular statute, the Code of Civil Procedure of the Philippine Islands. No question of jury trial on any of the issues was involved and the court granted the relief sought, defense against the contract, without a suit for reformation under the code procedure.

Mistake as Defense to Action on the Policy

Respondent argues that petitioner distorts the principle of "adequate remedy at law" and that mistake as a defense is based upon "present procedural changes" (R.B. 11). We take the latter to refer to the *West Virginia Code* provision,

Chapter 56, *Article* 5, *Section* 5, and the *Federal Rules of Civil Procedure, Rule* 8(c), cited in our brief filed with the petition. These were not relied upon as the basis for the remedy but rather to show that the remedy at law is confirmed and extended by code procedure.

The West Virginia statute enlarged and extended the relief afforded by affirmative defenses. At common law the defense was not available against a sealed instrument and did not afford relief by judgment over against plaintiff in a proper case. The statute was intended to extend the remedy to sealed instruments and permit recovery over of damages. *Hogg's Pleading and Forms, Fourth Edition* (W. Va.), page 294, citing *Columbia Accident Association* v. *Rockey*, 93 Va. 678, 25 S. E. 1009, page 1010. At common law mistake was always available as a defense to an unsealed instrument (Appendix to our original brief). The Federal Rules merely confirm the right to plead affirmative defenses.

Respondent concedes that at common law mistake was available but limited to certain types of mistake, that is, those "which operated at the time of the negotiations to prevent the contracting parties from reaching any agreement at all" (R.B. 18). We do not agree that mistake at common law was thus limited. However, since this case is clearly within the types mentioned, we see no reason to discuss this point. The alleged mistake here is that the parties did not intend a fire insurance policy. The minds of the parties never met and there was no contract of fire insurance effected, if respondent's theory is accepted.

In two of the West Virginia cases cited (R.B. 17), the only relief sought was in equity by reformation. The fact that equity will reform a contract in a proper case does not prove that the defense of mistake may not be available at law where denial of recovery is the only relief sought

in the particular case. See *Hagan* v. *Candler, Inc.*, (Ga.) 189 S. E. 595.

The case of *Knowlton* v. *Campbell*, 48 W. Va. 294, 37 S. E. 581, does not sustain the point for which cited, viz., that in West Virginia mistake in a written instrument is correctible only by reformation. Respondent quotes only part of the syllabus. Elsewhere in the syllabus both mistake and fraud are excepted from the rule excluding parol evidence in law and equity, the court distinguishing only as to whether there is an ambiguity on the face of the instrument. It must be borne in mind, however, that the court there was not dealing with mistake by way of defense but in contradiction of the contract on which plaintiff sought recovery in the action.

The later West Virginia cases make no such distinction so far as fraud and mistake are concerned, both being treated as exceptions to the parol evidence rule at law and in equity.

Attorneys' National Clearing House v. *Greever*, 121 W. Va. 601, 5 S. E. (2d) 621, syllabus 2;

> "In the absence of a showing of fraud or mistake, an unambiguous written agreement must be deemed the repository of the understanding between the parties."

To the same effect see:

Central Trust Company v. *Virginia Trust Company*, 120 W. Va. 23, 197 S. E. 12, syllabus 1;

Anderson v. *Hyman*, 113 W. Va. 760, 169 S. E. 741, syllabus 1.

The Issues of Estoppel and Negligence on the Part of the Insurance Company

This Court has recognized these issues as properly triable at law. *Union Mutual Life Insurance Company* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. See also *Massachusetts Bonding & Insurance Company* v. *Piedmont Service Station* (Va.), 181 S. E. 397, 400.

The Criticism of This Court's Rule in the Enelow and Ettelson Cases

The court in *Ring* v. *Spina* (C. C. A. 2) 166 F. (2d) 546 (R.B. 12), has not "viewed with considerable misgiving" the *Enelow* and kindred cases. It merely mentions the fact that Professor Moore criticized the rule, then adds "but for our purpose we must of course accept it as a gloss upon the statute, intended to promote prompt settlement in a case of the important question of form of trial" (Opinion, 548). And, further, "Since as later developed, we view the action as one of legal aspect, entitling the plaintiff to a jury trial on demand, our case is clearly within the *Ettelson* ruling and the order is appealable" (Opinion, 549).

Professor Moore couches his objection to the rule in the *Enelow* and *Ettelson* cases in these words:

> "Our criticism is predicated upon the belief that it is unsound to perpetuate a procedural anachronism which is at odds with the new federal procedure, and which flies in the face of the well-settled federal policy against interlocutory appeals, since it is only by an ingenious resort to the obsolete that the Court can bring the *Ettelson* case within the statutory authorization of an interlocutory appeal." 3 *Moore's Federal Practice* (1947 Supplement), §39.01, page 33.

As long as the right to jury trial depends upon whether the basic issue is legal and the relief afforded at law is

adequate, the court must necessarily determine in the first instance whether it is acting as a court of law or a court of equity. If it decides that it is acting as a court of law, then it would be illogical to refuse to recognize that, in the event it refuses a jury trial, it is thereby enjoining itself as a law court. If this be a "fiction" then it is a fiction which is justified by logic and by the need for preserving a litigant's constitutional rights.

But, we fail to see that the court's ruling in the *Enelow* and *Ettelson* cases is subject now to review by the Circuit Court of Appeals. Certainly this ruling is the law of the land and binding on the lower federal courts. We see no reason why we should now reexamine the court's reason for the rule.

Urgency of Respondent's Action for Reformation

Why all the undue haste in bringing an action for reformation before denial of the insured's claim and expiration of the time within which insured is barred from an action on the policy? Respondent says it could not risk delay as it might be charged with laches. We ask—would not a denial of liability have satisfied all requirements of notice? As a loss had already occurred and no other claim could possibly arise on the policy, what laches could thereafter be charged to the insurer? In the *Snell* case (R.B. 10), the question of laches arose in the case of insured and the court was determining whether he had been guilty of laches after discovery of the mistake. In the case of *American Life Insurance Company* v. *Stewart* (R.B. 10), a life insurance policy with an incontestible clause was involved. Judge Rutledge clearly differentiates this case in his opinion in *Prudential Insurance Company* v. *Saxe* (Opinion, 32).

Since the building has been destroyed, no further liability could arise under this policy, whether viewed as a fire or as

a windstorm policy. The insurer really does not want to reform the policy, but only seeks to deny liability and to try to keep the City from the jury trial to which it would be entitled if the City had sued.

Petitioner's right to a jury trial is clear, since the basic issues are legal and the remedy by defense to an action on the policy is adequate without any reformation of the policy. How then can it be said that the appeal presents "no question of substance" without annulling the prior decisions of this Court? The answer must be in the negative unless this Court intends now to depart from those decisions, a course which neither reason or policy would seem to dictate under the circumstances.

Respectfully submitted,

W. G. STATHERS,
Attorney for Petitioner.

(9731)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

396

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA, A MUNICIPAL CORPORATION,

Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED,

Respondent.

UPON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER ON HEARING

W. G. STATHERS,
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Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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CITY OF MORGANTOWN, WEST VIRGINIA, A MUNICIPAL CORPORATION,

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ROYAL INSURANCE COMPANY, LIMITED,

Respondent

UPON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER ON HEARING

The petitioner elected to stand upon the brief and reply brief filed upon the petition for a writ of certiorari herein and did not file an original brief upon hearing. Respondent having filed a brief upon hearing, this reply is deemed appropriate.

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals delivered on August 31, 1948, now having been reported, it is here noted that the same will be found in 169 F. 2d 713.

The decision of that Court dismissing our appeal is based solely on the conclusion that mutual mistake is not

available as a defense at law, relying upon dictum in *Union Mutual Life Insurance Company* v. *Mowry*, 96 U. S. 544, 24 L. Ed. 674, and the further conclusion that parol evidence is not admissible at law to prove a mistake, relying upon a Federal case, *Allegheny Valley Brick Company* v. *Raymond*, 219 Fed. 477 (CCA 2, 1914) and an early Wisconsin case, *Garage Equipment Company* v. *Danielson*, 156 Wis. 90, 144 N. W. 184. It is upon this basis alone that the Circuit Court of Appeals distinguishes our case from the *Enelow*, *Adamos* and *Ettelson* cases, involving parol evidence of fraud as a defense to the contract.

The Compulsory Counterclaim

The respondent observes that petitioner did not challenge its action for reformation of the policy on the ground that respondent had an adequate remedy at law. (Respondent's Brief, page 3.) Our reply is that under Federal Rules of Civil Procedure there is provided only one form of action and that under these rules the defendant has no choice but to bring into the case its legal claim on the policy. (Rule 2, One Form of Action, Rule 13 (a) Compulsory Counterclaims.) There having been a loss on the policy, a total destruction of the property insured, a hangar at the Municipal Airport, and the loss having occurred from a fire, the sole question in this action is whether the policy written by respondent is a fire insurance policy. If it is not a fire insurance policy, then there is no recovery on the policy, now or ever.

Mistake at Law under the Parol Evidence Rule

The dictum in the *Mowry* case is not binding on this Court. It was not urged that there was any mistake in the policy. In the Federal case cited, since the court did not find evidence that sustained the alleged omission from the written

instrument, expressions regarding the parol evidence rule are also dictum. We can see no useful purpose to be served in attempting an analysis of the cases cited by respondent on this point. There are as many variations in statement of the parol evidence rule on the question of admissibility of evidence of mistake in actions at law as there are cases on the subject. The courts have at times resorted to such refinements and subtleties to permit the admissibility of such evidence or to exclude it as the particular case seemed to warrant. The early West Virginia cases cited by respondent admit parol evidence where the instrument is ambiguous but infer that, in equity, parol evidence is admissible regardless of ambiguity in the instrument.

Knowlton v. *Campbell*, 48 W. Va. 294, 37 S. E. 581.

The later West Virginia cases make no such distinction and recite the rule to be, both in law and in equity, that where the contract is unambiguous parol evidence is not admissible "in the absence of a showing of fraud or mistake".

Attorneys' National Clearing House v. *Greever*, 121 W. Va. 601, 5 S. E. (2d) 621, syl. 2;

Central Trust Company v. *Virginia Trust Company*, 120 W. Va. 23, 197 S. E. 12, syl. 1.

There are expressions in the earlier cases, seeming to exclude parol evidence of mistake in actions at law. We find the author in 32 C.J.S. section 978, page 938, summarizing the cases in this manner: "* * * while many authorities declare that evidence of mistake is admissible only in equity and not in a court of law, this rule is by no means universal, and there are many cases in the books, especially since the tendency has grown up to obliterate the sharp distinctions between law and equity in which parol evidence has been held admissible to show a mistake in reducing the agreement to writing, irrespective of the form of the action and whether it is in fact an action at law or a suit in equity."

See also the Virginia case there cited, *Massachusetts Bonding and Insurance Company* v. *Piedmont Service Station, Inc.*, (Va.) 181 S. E. 397, pages 400-401.

If the question of admissibility rests upon ambiguity in the written contract, the respondent having urged that there is such ambiguity in the writing of the policy in question, under cases cited by him, the evidence of mistake is clearly admissible.

However, the court will find that the tendency in the growth of the common law is to get away from such technical distinctions between law and equity in the admission of evidence of fraud and mistake as a defense, and the same are either treated as exceptions to the parol evidence rule or the parol evidence rule is considered as not applying in such instances.

The *American Law Institute Restatement of Contracts*, Volume 2, section 507, pages 975-976, shows the trend toward a simplified procedure where the question of reformation arises by treating the contract as reformed in a proper case, whether suit in equity or action at law, as the nature of the case makes appropriate. Where affirmative relief is not required, a denial of recovery on the policy will accomplish all that could be accomplished if the policy were reformed as prayed in the complaint.

The Right to Plead Mistake as a Defense to an Action at Law

The Federal practice does not permit the court to assume jurisdiction as a court of equity if there is a plain, adequate and complete remedy at law. Title 28 U. S. C. A. 384. Thus the adequacy of the remedy is the first test of jurisdiction in equity. If mistake is available as defense at law, as we contend, then the remedy is adequate. The respondent says the adequacy of the remedy depends upon the right to so plead at law at the time of the adoption of the Seventh Amendment to the Constitution. (Respondent's Brief, page

9.) If respondent does not take into consideration the development of the common law, in view of the decisions of this court hereinafter mentioned, it cannot be thus narrowly limited, but we again accept respondent's premise as a basis for the argument which follows.

There are so few instances of mistake, which do not also include an element of fraud, that we turn to the early writers on equitable procedure, such eminent authorities as Pomeroy and Chitty. We direct the court to an excellent discussion of the classification of mistake and fraud as either equitable or legal in *Pomeroy's Equity Jurisdiction (Fourth Edition)* Volume 1, section 119, pages 140, et seq. The author notes that the particular fact which gives rights to an equitable remedy may also be the occasion of a legal remedy simultaneously therewith and that this is especially true with reference to fraud, mistake and accident. The test which he adopts in determining whether equity jurisdiction is exclusive in a particular instance is whether the remedy is given by courts of equity alone without regard to the nature of the substantive right. *Pomeroy's Equity Jurisdiction, (Fourth Edition)* section 138, page 169, and section 139, pages 170, et seq.

In *Chitty on Pleadings (Sixteenth American Edition)* Volume II, page 373, in line with our contention that the exclusive jurisdiction in equity existed only where the remedy was afforded only by a court of equity—as where reformation was necessary to relief, we find the author saying:

> "One frequent ground for the interference of a court of equity is *mistake*, but as a court of law has no means of reforming the contract which is the relief in general granted by a court of equity, it will only interfere where there is no occasion to reform the contract, as where the true contract has been completely performed, and there is nothing more to be done by either party; * * *"

The Federal courts have long considered mistake as a defense at-law. "When there is a misunderstanding as to the terms of the contract neither party is liable in law or equity."

First National Bank of Quincy, Illinois, v. *Hall,* 101 U. S. 43, 25 L. Ed. 822, citing: *Utley* v. *Donaldson,* 94 U. S. 29, 24 L. Ed. 54, and other cases.

In the *Ettelson* case, the court refused to recognize the distinction between "equitable" and "legal" fraud, as recognized in the New Jersey practice, the same not being binding on the federal courts. 137 F. 2d 62, 64, (CCA 3, 1943.) And in its later decision, in the *Ettelson* case, that court notes: "Our holding on the former appeal was that any and all species of fraud may in the federal courts, contrary to the New Jersey courts, be submitted directly to the jury as a defense to the plaintiffs' recovery upon the insurance policies and that preliminary consideration of the counterclaim with a view to the entry of a decree cancelling the policy sued on was not in accord with federal practice." 146 F. 2d 660, 663 (1947).

The lower federal courts have so understood and applied the *Ettelson* case:

Logan v. *Holman,* 7 F. R. D. 596, pages 597-599;

Garman v. *Metropolitan Life Insurance Company,* 7 F. R. D. 473.

In the case first cited, the court begins its examination of the question in this manner: "So that we must examine the issues, as crystallized by the pleadings herein, to determine whether under Federal Procedure, should the matter, because of the peculiar equitable circumstances involved, be tried by the court, as a chancellor, or should it be tried as a law action with questions of fact determined by the jury." The court concluded in line with the decisions of this court

that there is no distinction between equitable and legal fraud and holds that the defendant is entitled to a trial by jury as demanded by him.

We direct the court again to the test laid down in the *Saxe* (*Prudential Insurance Company* v. *Saxe*, 134 F. 2d 16) and other cases: Is the remedy at law adequate? If the respondent did not need to have the policy in question reformed, then it did not need to bring this action. Respondent says it "might have been flirting with disaster" had it waited until petitioner "saw fit" to sue upon the policy. (Respondent's Brief, page 8.) This is not a case where a petitioner was awaiting such time as it "saw fit" to institute an action. It was prohibited by the policy from bringing an action within sixty days after proof of loss. (R. 14.) The respondent does not say what "disaster" could have been anticipated and it is difficult for us to imagine any situation which could have prejudiced the respondent under the circumstances of this case, in view of the fact that the fire had already destroyed the subject insured under the policy and a mere denial of liability under the policy on the grounds set up in this action would have been notice to the petitioner of the claims which were presented for the first time in this action. We believe that the only purpose which could have been served, in so far as respondent is concerned, is the avoidance of a jury trial by the race to get into court under the assumed right to equitable relief, a practice which we believe should be discouraged here as it was in the *Saxe* case.

It is therefore respectfully submitted that the Circuit Court of Appeals erred in dismissing petitioner's appeal and that the order of August 31, 1948, should be reversed.

W. G. Stathers,
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Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948
NO. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, Petitioner,

v.

ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

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ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

This case involves an attempt by petitioner to appeal from an order of the District Court for the Northern District of West Virginia entered on May 3, 1948, holding that there should be a trial by the Court without a jury of the only issue presented in the case—i.e., whether an insurance policy should be reformed and corrected in its coverage so as to constitute a windstorm policy, rather than a fire insurance policy. The Circuit Court of Appeals dismissed the appeal: 169 F. (2d) 713. The Court of Appeals said petitioner's appeal was dismissible on two different grounds: (1) because the order for a non-jury trial was not, in the situation here presented, equivalent to the grant of an interlocutory injunction within the doctrine of *Enelow v. New York Life Insurance Company*, 293 U. S. 379 (1935); and (2)

because "the appeal presents no question of substance" (R. 30).

Statement of the Case.

Petitioner City of Morgantown had been carrying a windstorm insurance policy in the amount of $22,000.00 covering the hangar at the Municipal Airport. The windstorm insurance premium was 20¢ per $100.00 for a one-year term, or a total annual premium of $44.00 on the $22,000.00 policy. On March 22, 1947, the windstorm policy came up for renewal, at which time respondent's local agent issued to petitioner the policy in suit, both parties intending it merely as a renewal of the prior windstorm policy. The renewal policy of $22,000.00 was for a term of one year, commencing March 22, 1947, and carried the correct annual windstorm premium of $44.00. However, through an oversight on the part of the local agent, the premium and coverage figures in the renewal policy were inserted in the blank spaces on the policy form opposite the words "Fire and Lightning," instead of on the line opposite the words "Windstorm and Hail" as they had been on the prior policy (R. 13). The annual fire insurance premium on a $22,000.00 fire policy would have been $338.80, as contrasted with the small windstorm premium of $44.00 (R. 3). The mistake made in the coverage of the renewal policy as written is further reflected by the fact that the word "Windstorm" (not "Fire") was typed on the front of the renewal policy in the blank space provided for the entry of "Peril Covered" (R. 17).

The mistake in the writing of the renewal policy was not discovered until after a fire destroyed the hangar on August 20, 1947. There was no windstorm loss.

Mindful of the fact that, from the time of the discovery of the mistake, it might be charged with laches in seeking reformation of the policy, respondent instituted its action for reformation and correction of the policy in the District Court on October 29, 1947. Petitioner did not, either by motion or in its answer, challenge respondent's reformation action on the ground that the latter had any adequate remedy at law. Instead, petitioner responded to the action (1) by filing its answer setting up the defense that there had been no mutual mistake in the writing of the renewal policy, and that it was properly written as a fire insurance policy; and (2) by filing its counterclaim seeking judgment for $22,000.00 upon the renewal policy as a fire insurance policy. Respondent answered the counterclaim, admitting that the hangar had been destroyed by fire, but asserting that the policy in suit, upon being reformed and corrected to conform to the mutual intent and understanding of the parties, in accordance with the relief sought by respondent, would be a windstorm policy, and not a fire insurance policy. What this then left in the case for trial was aptly described by Judge Parker in the opinion of the Circuit Court of Appeals:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law." (R. 29).

With the case in this posture, the District Court held that the trial of the reformation issue, which was the only controversy remaining in the case, either in the main action or on the counterclaim,* should be by the court without a jury. It is from such ruling that petitioner has sought to appeal.

The Questions Presented.

Respondent conceives that the questions here presented are not confined, as stated in the petition for certiorari, merely to the one issue of whether the District Court's order should be construed, in the technical sense, as an "injunction" appealable under Section 129 of the Judicial Code, 28 *U.S.C.A.* 227.** Petitioner is confronted with the further proposition that, as the Circuit Court of Appeals below said, the appeal was also dismissible "on the ground that the appeal presents no question of substance" (R. 30).

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* Petitioner's counterclaim involved no issue for measurement of damages, for the *West Virginia Code*, Chapter 33, Article 4, Section 9, fixes the recovery, if any, at the face amount of the policy when there is a total loss: "All fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon such real estate."

** In the new Federal Judicial Code, effective September 1, 1948, Section 129 is embodied as 28 *U.S.C.A.* 1292.

ARGUMENT

1.

The District Court's order for trial by the court of the equitable issue of reformation should not be interpreted as an "injunction" order appealable under the doctrine of Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935) and kindred cases.

Petitioner relies upon *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935); *Adamos v. New York Life Insurance Company*, 293 U.S. 386 (1935); and *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 (1942). All of those cases followed the same procedural pattern: actions were instituted for recovery upon life insurance policies following the death of the insureds; by way of defense, the life insurance companies, relying upon alleged fraud in the applications for the policies, sought cancellation; and the District Courts ruled that the issue of fraud raised by the prayer for cancellation should be tried by the court without a jury, in advance of any trial of the actions on the policies. This Court held that, in such procedural situation, the orders directing trial of the fraud issue by the court, and postponing trial of the actions upon the policies, were equivalent to an "injunction," and therefore appealable under Section 129 of the Judicial Code.

But the present case is clearly distinguishable from those cases. At the outset, there is the fundamental distinction that, while in all the cases relied upon by petitioner the defense of the insurance companies was being predicated upon the *legal* issue of fraud, the *sole* issue here is the purely *equitable* one of reformation. Historically, reformation is a creature of equity. Suits

for reformation of written instruments were cognizable only in the equity courts. Reformation to correct a mutual mistake was never available as a defense to a law action on the written contract because of the conflict with the parol evidence rule. This Court has always observed the basic distinction between law and equity where a right to reform a written instrument for mutual mistake has been asserted. In *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544, 547 (1878), this Court said of an insurance policy:

> "The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

In *Lumber Underwriters v. Rife,* 237 U.S. 605, 610 (1915), Mr. Justice Holmes used the following oft-quoted language:

> "Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a shortcut to reformation by letting the jury strike out a clause."

And compare *Northern Assurance Company v. Grand View Building Association*, 183 U.S. 308 (1902) with *Northern Assurance Company v. Grand View Building Association*, 203 U.S. 106 (1906). In the latter case, this Court sustained reformation of an insurance policy in equity after declining to permit the terms of the same policy to be reformed or varied in an earlier law action.

The Circuit Court of Appeals for the Fourth Circuit has consistently held, in cases arising from West Virginia*, that relief by way of reformation is not for the law court, but must be sought in equity with a trial by the chancellor: *Clarksburg Trust Company v. Commercial Casualty Insurance Company*, 40 F. (2d) 626 (CCA 4, 1930); *Great American Insurance Company v. Johnson*, 25 F. (2d) 847 (CCA 4, 1928).

Nor does reformation lose its equitable character, and become converted into a legal issue in the sense that a jury trial is required, merely because in recent years it has been made pleadable as an *equitable* defense in law actions, first under Section 274 (b) of the Judicial Code, 28 *U.S.C.A.* 398, and later in the one form of civil action now provided for in the Federal Rules of Civil Procedure. This Court has consistently held that an equitable defense pleadable as such under Section 274 (b) remains triable by the court without a jury, even though it is

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* The question of the proper method of trial is apparently not controlled by the rule of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), but by Federal law: *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62 (CCA 3, 1943), cert. denied, 320 U.S. 777. But in any event, as pointed out in a later section of this brief, the West Virginia courts treat reformation as an equitable issue triable by the court without a jury.

invoked as a defense against a law action. The *Enelow* case, *supra,* at page 382, is itself authority for such proposition:

> "When the Congress enacted § 274 (b) of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law 'by answer, plea or replication without the necessity of filing a bill on the equity side of the court'. The defendant is to have 'the same rights' as if he had filed a bill seeking the same relief. The equitable issue 'is to be tried to the judge as a chancellor'. The same order of trial is preserved as under the system of separate courts. *Liberty Oil Co. v. Condon Bank,* 260 U.S. 235, 242, 243, 67 L. Ed. 232, 234, 236, 43 S. Ct. 118. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. * * *".

In *Liberty Oil Company v. Condon National Bank,* 260 U.S. 235, 242-3 (1922), this Court said:

> "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury. * * * The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was

at common law. * * * This was the practice in the courts of law and chancery in England when our Constitution and the 7th Amendment were adopted, and it is in the light of such practice that the 7th Amendment is to be construed."

And the adoption of the Federal Rules of Civil Procedure, though providing for one form of civil action, did not enlarge the right to a jury trial by requiring trial by jury of an equitable issue theretofore recognized as triable by the court: *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 65 (CCA 3, 1943); *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37, 39 (D.C., Mass., 1939).

Reformation is recognized as retaining its equitable character, and as the proper subject of a trial by the court without jury, even though, by virtue of modern procedural devices, it may now be asserted as a defense to a law action on the written instrument sought to be reformed, rather than in an independent equity suit for reformation: *Philippine Sugar Estates Development Company v. Philippines,* 247 U.S. 385, 388-9 (1918); *Donnelly v. Northwestern Life Insurance Company,* 59 F. (2d) 46 (CCA 5, 1932); and *Upson Nut Company v. American Shipbuilding Company,* 251 Fed. 707 (N.D., Ohio, 1918). In the *Philippines* case, *supra,* this Court said:

"The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in effect, a bill in equity for reformation, and incidentally to enjoin the action at law. * * * The proceeding became thus an equitable one. * * * The

proper method of review by this court is, therefore, by appeal; and the writ of error is dismissed."

The clear distinction between the challenge to a written instrument by a claim for its reformation based upon mutual mistake, and a challenge under the guise of "cancellation" but based upon the legal defense of fraud, was aptly pointed out by Judge Parker in the opinion of the Court of Appeals in the present case:

> "* * * The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co. v. Saxe*, App. D. C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy at law, *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties." (R. 29).

In the present case, too, respondent's action for reformation preceded any action for recovery upon the policy. Respondent would have been flirting with disaster had it waited until petitioner saw fit to sue upon the policy before the right to reformation was asserted, for a litigant seeking reformation of a written instrument for mutual mistake cannot risk delay in seeking relief after the mistake is discovered: compare *Snell v. Atlantic Fire and Marine Insurance Company*, 98 U.S. 85, 90 (1878); *American Life Insurance Company v. Stewart*, 300 U.S. 203 (1937); and 106 *A.L.R.* 1338, note.

In its argument here, petitioner urges, as a ground for a jury trial of the reformation issue, a distorted application of the principle of "adequate remedy at law". Petitioner argues that the mere fact such defense may, under present procedural rules, be pleaded defensively in an action on the policy, affords respondent an adequate remedy at law, and thereby puts reformation in the class of issues to be tried by a jury. But that was not the theory of the *Enelow* case and *Prudential Insurance Co. v. Saxe,* 134 F. (2d) 16 (D.C. App. 1943), upon which petitioner relies. In those cases, the insurer's remedy at law was pronounced adequate for an entirely different reason—i.e., because the defense of fraud there involved was historically cognizable at law, so that the legal remedy had always been entirely adequate, unless the insurer could show a cancellation suit in equity was necessary for its protection. As no special circumstances necessitating cancellation were found to exist, there was an adequate remedy at law. Petitioner ignores the fact that, as a defense to an action at law, reformation and fraud are not in the same class, and do not have the same historical background.

Even if respondent's initial action for reformation be disregarded, and the case here is viewed as if the claim for reformation was first asserted by way of defense to an action on the policy, the case stands in the following posture: there is but one issue to try in the entire litigation; that issue is whether the insurance policy should be reformed for mutual mistake; and that issue, with its historic origin in the equity courts, is universally recognized as being purely *equitable* in character. Indeed, what is there here for a jury to try? There is no legal issue to submit to a jury. Insofar as petitioner's counterclaim upon the policy is concerned,

unless and until the policy be reformed to constitute a windstorm policy, there is no defense to be heard; the impaneling of a jury would be an idle gesture, for the court would simply direct a verdict for petitioner.

The rule of appealability applied in the *Enelow* case and kindred cases has already been viewed with considerable misgiving: See *Ring v. Spina*, 166 F. (2d) 546, 548 (CCA 2, 1948); *Beaunit Mills v. Eday Fabric Sales Corporation*, 124 F. (2d) 563, 565 (CCA 2, 1942); and 55 *Harvard Law Review* 861. But however that may be, it seems clear the rule should not be further extended to apply to a case, like the present one, where the District Court, in litigation embodying no disputed legal issue, merely ordered the sole *equitable* issue to be tried by the court without a jury.

As Judge Parker said in the present case:

> "Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing the course of litigation. * * *". (R. 30).

2.

No question of substance is presented by the Petition; and certiorari should not be granted.

Aside from the technical question of appealability, the dismissal of the appeal by the Circuit Court of Appeals was plainly right, since on the merits* the question sought to be presented was wholly without substance. The Court of Appeals thought so, saying:

> "And even if the order allowing** jury trial were appealable, the motion to dismiss might well be allowed on the ground that the appeal presents no question of substance." (R. 30).

It seems clear, from Judge Parker's opinion, that if the Court of Appeals had entertained petitioner's appeal, the District Court's order would have been affirmed on the merits. This Court will not grant a review if the question on which the review is sought, though in form appearing on the record, is in substance wholly without merit. In *Brolan v. United States,* 236 U.S. 216, 218 (1915), it was said:

> "* * * It behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because, although in form arising, it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction."

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* As was pointed out by Judge Clark in *Ring v. Spina,* 166 F. (2d) 546, 549 (CCA 2, 1948), the decision on the merits upon an appeal of this type is "inextricably intertwined with that of appealability".

** It seems obvious that the word "allowing" was inadvertently used by the court here in place of "disallowing" or "denying".

And in *United States v. Lane*, 232 U.S. 598, 600 (1914), this Court said:

> "* * * The right to review does not obtain where it is evident that the formal questions, as presented by the record, are so wanting in substance as to cause them to be frivolous and devoid of all merit."

It is submitted that petitioner's application for certiorari falls squarely within such ban, for the record reflects, as the Court of Appeals said, that the District Court's order for trial of the equitable issue of reformation without a jury was plainly right on the merits. Whether it be viewed from the standpoint of respondent's original action for reformation, or in the aspect of a defense to petitioner's counterclaim on the policy, the reformation issue did not lose its basic *equitable* character, and hence was triable by the chancellor.

Petitioner's effort to put *reformation* in the same class as the defense of *fraud* under an insurance policy is fallacious: Petitioner completely ignores the fact that the *Enelow* case, and kindred cases relied on by petitioner, all involved the issue of *fraud*, which from the earliest times has been provable as a defense to a law action on an insurance policy; and those decisions turned upon the historic availability of fraud as a legal defense. But it does not follow that because an equitable defense is now pleadable in a civil action, such defense loses its historic equitable status so as to be triable of right by a jury. It is significant that after the *Ettelson* case went back to the Circuit Court of Appeals for the Third Circuit for a decision on the merits, that Court explored, as the decisive test for or against a jury trial, the question of whether fraud was

historically available to the insurer as a legal defense to an action at law. Following such search, the Court of Appeals stated its conclusion in *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62, 65-6 (CCA 3, 1943)*:

> "* * * We find federal decisions going back for more than one hundred years in which, in suits on insurance policies, the quesiton of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy.
>
> * * * * * * *
>
> "The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since."

Thus, upon application of the same test, if the issue for trial in the *Ettelson* case had been reformation rather than fraud, it is clear that a trial of such issue by the court without a jury would have been approved by the Court of Appeals.

Petitioner's argument amounts to this: that as the Federal Rules of Civil Procedure provide for one form of civil action, and since reformation, though solely of equitable origin, might now be asserted as a defense in a civil action prosecuted by petitioner upon the policy, the 7th Amendment to the Constitution guarantees petitioner a jury trial of such issue. The petition for certiorari asserts "the order of the Circuit Court of Appeals * * * results in the denial of the constitutional right of jury trial on a legal claim" (Petition, p. 3).

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* Certiorari denied: 320 U.S. 777 (1943).

But when did such "constitutional right" arise? It did not arise with the 7th Amendment, for under the practice then prevailing, jury trials of reformation cases were unheard of. It did not arise from the passage of Section 274 (b) of the Judicial Code, permitting the interposing of "equitable" defenses in law actions, for any equitable issues pleaded under the statute were to be tried by the court without a jury: *Enelow v. New York Life Insurance Company; Liberty Oil Company v. Condon National Bank, supra.* Nor did the asserted "constitutional right" arise with the adoption of the new Federal Rules of Civil Procedure. The enabling Act of June 19, 1934, 48 Stat. 1064; 28 *U.S.C.A.* 723b, which initiated the movement for the new Rules, itself provided that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; and the courts are in accord that the Federal Rules were never intended either to enlarge or restrict the right to a jury trial. In *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 65 (CCA 3, 1943), the Court said:

> "* * * Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. * * *."

To the same effect are: *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37 (D.C., Mass., 1939); *Bynum v. Prudential Life Insurance Company,* 7 F.R.D.

585 (E.D., S.C., 1947); *Logan v. Holman,* 7 F.R.D. 596 (D.C., N.J., 1947).

While it is believed that the appropriate method for trial of the reformation issue is to be decided in accordance with Federal law, rather than West Virginia law,* it may not be amiss to point out that in the West Virginia courts, trial of a reformation issue would be had before the chancellor, and not by a jury. It is true that a West Virginia statute, embodied in *West Virginia Code,* Chapter 56, Article 5, Section 5, and quoted by petitioner, permits the pleading of certain types of equitable defenses in law actions. But even so, this would do nothing more than Section 274 (b) of the Judicial Code, in permitting the pleading of an equitable defense in a law action; and the issue itself does not lose its equitable character. In West Virginia, mutual mistake in a written instrument is correctible only by reformation in equity. In *Knowlton v. Campbell,* 48 W.Va. 294 (1900), the Syllabus of the opinion concisely states the rule as follows:

> "* * * a court of equity may, for a mistake mutual to both parties, reform the contract in a suit brought expressly to correct such mistake, and then oral evidence of any kind is admitted to establish the mistake; but this cannot be done in a court of law, which must take the contract as written."

And see *Johnston v. Terry,* 128 W.Va. 94 (1945) and *Hanley v. Harmison,* 89 W.Va. 608 (1921).

In its brief, petitioner asserts that "mistake" is pleadable as a defense at common law. This is true

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* See *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 64-5 (CCA 3, 1943).

as to some types of mistake, which operated at the time of the negotiations to prevent the contracting parties from reaching any agreement at all. Such a mistake is found in the classic English case of *Raffles v. Wichelhaus,* 2 H. & C. 906 (1864), where, in a contract for the sale of cotton to be carried by the ship "Peerless" from Bombay, it appeared that the contracting parties had in mind two different ships by that name sailing from Bombay, so that no effective agreement was ever reached; and in *Kyle v. Kavanagh,* 103 Mass. 356 (1869), an action at law wherein it was held that if the parties had in mind two entirely different properties when the written contract was prepared, there could be no recovery upon it. Another type of "mistake" available as a defense at law is where the parties erroneously assumed the subject matter of their agreement was still in existence: *Paxton Lumber Company v. Panther Coal Company,* 83 W.Va. 341, 352 (1919).

But to rely upon "*mutual* mistake" as a common law defense to an action on a written instrument would be to ignore completely the parol evidence rule, which the law courts enforce. This Court has repeatedly denied litigants the right to show mutual mistake in a written contract by parol evidence except in a suit for reformation in equity: *Union Mutual Life Insurance Company v. Mowry, supra; Lumber Underwriters v. Rife, supra;* and *Northern Assurance Company v. Grand View Building Association, supra.* And, as we have seen, the procedure in West Virginia is in accord: *Knowlton v. Campbell, supra.*

The rule is stated in 17 *Corpus Juris Secundum,* p. 495, as follows:

"A mistake of expression occurs where the

parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. Here in courts of law the contract must stand as it is written, for it is a well settled rule of evidence in those courts that parol evidence is not admissible to contradict, add to, or vary a writing * * *. Equity may in a proper case grant relief by way of reformation * * *".

And in *New York, etc. Co. v. Preferred Underwriters*, 252 Mass. 1 (1925), the Court said:

"In the absence of an obvious mistake, a plaintiff in an action at law cannot correct by parol evidence substantial errors in the terms of a written instrument to which he and the defendants are directly or medially parties, the remedy of parties so situated being in a court of equity for reformation of the instrument."

Accordingly, respondent conceives the Circuit Court of Appeals here was clearly right in saying that "the appeal presents no question of substance". (R. 30).

For the foregoing reasons, it is respectfully submitted that petitioner's application for certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1948

NO. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, Petitioner,

v.

ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

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ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

Petitioner complains of a judgment of the Circuit Court of Appeals for the Fourth Circuit dismissing petitioner's appeal from an order of the District Court for the Northern District of West Virginia, entered on May 3, 1948, denying a jury trial of the single issue presented in this case. The issue was whether the policy in suit should stand, as written, as a fire insurance policy, or whether, because of an alleged mistake in writing it, the coverage provision of the policy should be corrected so as to make it a windstorm insurance policy, in conformity with what respondent alleged was the mutual intent and understanding of the parties. Thus, the issue was one of *mutual mistake*.

The Court of Appeals, in its opinion reported in 169 F. (2d) 713, said petitioner's appeal was dismissible on

two different grounds: (1) because the order for a non-jury trial was not, in the situation here presented, equivalent to the grant of an interlocutory injunction within the doctrine of *Enelow v. New York Life Insurance Company*, 293 U. S. 379 (1935); and (2) because "the appeal presents no question of substance" (R. 30).

STATEMENT OF THE CASE.

On March 22, 1946, petitioner purchased from respondent a windstorm policy in the amount of $22,000.00 covering the hangar at the Municipal Airport, the term of the policy being from March 22, 1946 to March 22, 1947. The windstorm premium was 20¢ per $100.00 for the one-year term, making a total annual premium of $44.00. On March 22, 1947, when the windstorm policy expired, respondent's local agent issued to petitioner the policy in suit; this policy, also in the amount of $22,000.00, was for a term of one year commencing on March 22, 1947, and carried the correct annual windstorm premium of $44.00.

Respondent alleges that the policy issued on March 22, 1947 was intended by the parties to be merely a renewal of the expiring windstorm policy, but that, through an oversight on the part of the local agent, the premium and coverage figures in the renewal policy were inserted in the blank spaces on the policy form opposite the words "Fire and Lightning", instead of on the line opposite the words "Windstorm and Hail" as they had been on the prior policy (R. 13). The result was that, as written and issued, the policy of March 22, 1947 described the coverage as insurance against loss by fire, notwithstanding the fact that the premium of $44.00 inserted in the policy was the rate for windstorm insur-

ance. The annual premium on a $22,000.00 fire insurance policy would have been $338.38, as contrasted with the small windstorm premium of $44.00 (R. 3). At another place in the policy, though not in the coverage clause, the word "Windstorm" had been typed on the policy form (R. 17).

The mistake in the writing of the renewal policy was not discovered until after a fire destroyed the hangar on August 20, 1947. There was no windstorm loss.

Mindful of the fact that, from the time of the discovery, it might be charged with laches in asserting the mutual mistake, respondent instituted its action for reformation and correction of the policy in the District Court on October 29, 1947. Petitioner did not then challenge respondent's reformation action on the ground that the latter had any adequate remedy at law. Instead, petitioner responded to the action (1) by filing its answer denying any mutual mistake in the writing of the March 22, 1947 policy, and alleging that it was properly written as a fire insurance policy; and (2) by filing its counterclaim seeking recovery upon the policy as a fire insurance policy. Respondent answered the counterclaim, admitting that the hangar had been destroyed by fire, but asserting that the policy in suit, upon being reformed and corrected to conform to the mutual intent and understanding of the parties, would be a windstorm policy, and not a fire insurance policy. What this then left in the case for trial was aptly described by Judge Parker in the opinion of the Circuit Court of Appeals:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff,

defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law." (R. 29).

With the case in this posture, the District Court held that the trial of the mutual mistake issue, which was the only disputed issue for trial, either in the main action or on the counterclaim, should be by the court without a jury. It is from such ruling that petitioner has sought to appeal.

THE QUESTIONS PRESENTED.

Respondent conceives that the questions here presented are: (1) whether the District Court's order denying a jury trial of the mutual mistake issue should be construed, in the technical sense, as an "injunction" appealable under Section 129 of the judicial Code, 28 *U.S.C.A.* 227;* and (2, whether, as the Court of Appeals below said, petitioner's appeal was also dismissible on the ground that "the appeal presents no question of substance". (R. 30).

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* In the new Federal Judicial Code, effective September 1, 1948, Section 129 is embodied as 28 *U.S.C.A.* 1292.

ARGUMENT.

I.

THE SOLE ISSUE FOR TRIAL WAS WHETHER THERE HAD BEEN A MUTUAL MISTAKE IN THE WRITING OF THE POLICY, SO THAT IT SHOULD BE CORRECTED TO CONFORM TO THE MUTUAL INTENT OF THE PARTIES. THERE IS NO CONSTITUTIONAL RIGHT TO JURY TRIAL OF SUCH EQUITABLE ISSUE.

At the outset, it seems desirable to define the precise issue which confronted the District Court at the time it entered the order denying a jury trial.

1. What the Issues for Trial Was.

This case had its inception as an action by the insurance company for reformation of the policy. In such action, respondent alleged that the parties intended to effect windstorm insurance, but that, through mistake, the policy was written to cover against loss by fire, so that it did not correctly express the mutual intent of the contracting parties. Petitioner answered, denying that any mutual mistake had been made, and counterclaimed upon the policy as written. To the counterclaim, respondent's sole defense was the alleged mutual mistake made in the writing of the policy, for which correction had already been sought in the reformation action.

Thus, on the counterclaim as well as in the reformation action, there was only one issue for trial in the District Court—whether the policy, as written, did or did not conform to the actual agreement and intent of the parties. Petitioner said it did; respondent said it did not. Both parties took the position that a binding agreement between them had been effected; the only

question was what that agreement actually was, and whether the policy as issued was a correct memorial of it. In short, the sole issue involved was the existence or non-existence of *mutual mistake* in writing up the agreement of the parties, and the right of respondent to seek correction of such mistake.* When both contracting parties intended the same thing, but it is not correctly expressed in the written agreement, the mistake is "mutual", though the error in draftsmanship was the act of only one of the parties: *Neary v. General American Life Insurance Company,* 140 Neb. 756, 1 N.W. (2d) 908 (1942).

On the counterclaim, as in the reformation action, there is nothing in the case to try, aside from the mutual mistake issue. The counterclaim involved no issue for measurement of damages, for the *West Virginia Code,* Chapter 33, Article 4, Section 9, fixes the recovery, if any, at the face amount of the policy when there is a total loss: "All fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon such real estate."

Thus, if respondent fails to sustain its contention that the policy as written did not conform to the mutual

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* Petitioner's contention that respondent might be estopped, because of laches, negligence, or otherwise, from seeking relief against the alleged mistake in the coverage of the policy, is pointless in any consideration of the appropriate method of trial. If the issue of mutual mistake is the proper subject for a trial by the court, petitioner's grounds, if any, for asserting that respondent is estopped from obtaining correction of the mistake are for determination at such trial; they furnish no basis for a different method of trial.

intent and agreement of the parties, petitioner would be entitled to recover the face amount of the policy. As Judge Parker concisely stated in the opinion of the Court of Appeals below:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything. * * *". (R. 29).

2. A Mutual Mistake Made in Reducing an Agreement to Writing, When Relied Upon in Defense to an Action on the Instrument, Raises an Equitable Issue Which is not for Jury Trial.

Petitioner concedes that when mutual mistake is asserted in an action to reform a written instrument, and to recover upon it as reformed, the issue raised is equitable in character, and no right to jury trial exists. The rule that a written instrument cannot be reformed in a law action is too well settled for argument: *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544 (1878); *Lumber Underwriters v. Rife,* 237 U.S. 605 (1915). And compare *Northern Assurance Company v. Grand View Building Association,* 183 U.S. 308 (1902) with *Northern Assurance Company v. Grand View Building Association,* 203 U.S. 106 (1906). In the latter case, this Court sustained reformation of an insurance policy in equity after declining to permit the terms of the same policy to be reformed or varied in an earlier law action.

The basis of the rule, of course, is that at law parol evidence is not admissible to vary the terms of a written instrument. As Mr. Justice Holmes said in *Lumber Underwriters v. Rife, supra,* at page 610:

> "Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a shortcut to reformation by letting the jury strike out a clause."

In the present case, respondent did institute, in the first instance, an action for reformation. However, petitioner argues that the relief sought by respondent in such action was wholly unnecessary, and that the mutual mistake could have been pleaded as a defense in any subsequent action prosecuted by petitioner to recover on the policy. Hence, petitioner says that there was an "adequate remedy at law".

We do not concede the correctness of petitioner's premise that the reformation action was unnecessary or premature, on the theory that respondent could, under the present Federal Rules, plead mutual mistake if and when petitioner sued on the policy. Respondent might have been flirting with disaster had it waited until petitioner saw fit to sue upon the policy before the right to reformation was asserted, for a litigant who must seek correction of a written instrument for mutual mistake cannot risk delay after the mistake is discovered: compare *Snell v. Atlantic Fire and Marine Insurance Company*, 98 U.S. 85, 90 (1878); *American Life Insurance Company v. Stewart*, 300 U.S. 203 (1937).

But the basic vice in petitioner's argument is that it confuses the right of respondent to plead mutual mis-

take defensively in the Federal Court under modernized procedure, with the quite different question of whether, as of the time of the adoption of the Seventh Amendment to the Constitution, respondent could have pleaded such defense *in a law action,* which is the test of whether petitioner had a constitutional right to jury trial of such issue. An attempt to show that a written contract does not set forth the mutual intent and agreement of the parties raises an *equitable* issue, whether it be invoked affirmatively in a suit to reform the contract, or defensively in an effort to correct the contract on which the opposing party is suing. Its equitable character stems from the fact that, unless permitted by statute, a litigant could not rely at all in the law courts upon an alleged mistake made in recording the agreement of the parties in a written instrument. To do so clashed directly with the parol evidence rule. The integrity which the law courts must accord to a written agreement, when either of the contracting parties attempts to impeach it for mistake, was aptly stated by this court in *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544, 547 (1878):

> "the entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

Professor Williston, in 2 *Williston on Contracts,* at page 1221, says that the parol evidence rule is a "rule of substantive law which, when applicable, defines the limits of a contract"; and later, at page 1224, he says:

> "All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration whether they were oral or written".

Petitioner agrees that a prior reformation of the policy by the court would be required, in the event the factual situation here were reversed and petitioner were complaining of a mutual mistake in the insurance coverage, as for example, if the hangar had been destroyed by windstorm instead of by fire, and petitioner had sought recovery on the policy by having the coverage changed from "fire" to "windstorm". But petitioner says that the same principle does not hold true, where it is the defendant in an action on the contract who must seek correction in the coverage of the policy. We do not agree with this concept, and the authorities are to the contrary.

Petitioner's briefs* assert that "mistake" has always been recognized as a legal defense in law actions. This is true with respect to certain types of "mistake", when invoked for the purpose of showing that no contract at all was ever effected between the parties. Such a mistake is found in the classic English case of *Raffles v.*

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* The reference is to petitioner's briefs filed in support of the petition for certiorari. No further brief had been filed by petitioner when this brief of respondent was printed.

Wichelhaus, 2 H. & C. 906 (1864), where, in a contract for the sale of cotton to be carried by the ship "Peerless" from Bombay, it appeared that the contracting parties had in mind two different ships by that name sailing from Bombay, so that no effective agreement was ever reached; and compare *Kyle v. Kavanagh,* 103 Mass. 356 (1869). Another type of "mistake" available as a defense at law is where the parties erroneously assumed the subject matter of their agreement was still in existence: *Paxton Lumber Company v. Panther Coal Company,* 83 W. Va. 341, 352 (1919).

But when it argues that, in the absence of a statute permitting the interposing of an equitable defense, a defendant could in a law action attack the integrity of the written instrument sued upon in the very teeth of the parol evidence rule, petitioner goes too far. The fallacy in the argument is that it makes no distinction whatsoever between the defense of "mistake" generally and the defense of "mutual mistake", the purpose of which is to show that the parties did reach an agreement, but failed to express their mutual intent correctly in the instrument. If respondent had attempted, by way of defense in a common law action on the policy, to assert, in effect, that the word "fire" had been mistakenly used in the place of the word "windstorm", the evidence would have been stricken and a verdict directed against petitioner, as the law courts could take no cognizance of such a defense. In its brief filed thus far, both in this Court and in the Court of Appeals below, petitioner has cited no case in which any such defense was permitted at common law.* The court decisions on the subject which we

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* At the bottom of page 6 of its brief accompanying the petition for certiorari, petitioner cited five cases in

have found hold squarely contrary to the petitioner's contention.

With respect to the different treatment which courts of equity and courts of law accord to mutual mistake in a written instrument, the general rule is well stated in 17 *Corpus Juris Secundum* 495:

> "A mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. Here in courts of law the contract must stand as it is written, for it is a well settled rule of evidence in those courts that parol evidence is not admissible to contradict, add to, or vary a writing * * *. Equity may in a proper case grant relief by way of reformation * * *."

Judge Parker stated the rule concisely in his opinion below in the present case:

> "No distinction exists between reforming the policy as a basis of suit and reforming it for the

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support of its argument that mutual mistake in the terms of a written contract could be pleaded as a defense at common law. But none of those cases are in point in a situation where the mistake involved, as here, a change in the language and meaning of the written contract. For example, the cited cases of *Wilson v. Queens Insurance Company*, 5 Fed. 674 (1881) and *U.S. v. Charles*, 74 Fed. 142 (1896) merely stand for the well-settled principle that, as a defense to a law action on a written instrument, the defendant may show the existence or non-existence of a certain fact upon which the entire agreement was conditioned. Such defense does not seek to change or correct the contract; it merely establishes that an effective contract never came into being. Compare *Raffles v. Wichelhaus* and *Kyle v. Kavanagh, supra.*

assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written, and parol evidence to add to, alter or deny its terms is not admissible." (R. 29).

In *Allegheny Valley Brick Company v. Raymond,* 219 Fed. 477 (CCA 2, 1914), the defendant attempted, in its answer filed in a law action upon a written contract, to rely upon an alleged mutual mistake. The court held that such defense was not maintainable in the law action, saying at page 480:

> "It is, of course, within the province of a court of equity, in cases of mutual mistake, to make the written evidence of an agreement correspond to the understanding of the parties. A common-law court, however, possessed no such power. In some of the states the distinction between actions at law and suits in equity has been abolished, and a suit for the reformation of a written contract, which would under the former system have been a suit in equity, is in such states a civil action under the Code. But in the federal courts the distinction between suits in equity and actions at law is maintained, and in a common-law action, such as this is, a federal court is without power to reform a contract, or to recognize as an equitable defense the failure of one of the parties to perform a condition which is alleged to have been omitted by mutual mistake from the contract as written. * * *".

In *Garage Equipment Company v. Danielson,* 156 Wis. 90, 144 N.W. 284 (1913), there was a suit in equity to reform a written contract, and to enjoin an action at

law being prosecuted upon it. The defendant in the equity suit argued that the equity plaintiff had an adequate remedy at law, through the use of parol evidence in defense of the law action. But the Wisconsin court rejected this argument, saying:

> "Without reformation, plaintiff could not, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of the contract."

Two cases presenting factual situations similar to the present one are *Neary v. General American Life Insurance Company,* 140 Neb. 756, 1 N.W. (2d) 908 (1942), and *Williams Manufacturing Company v. Insurance Company of North America,* 95 Vt. 132, 113 Atl. 780 (1921). In the *Neary* case, a policy holder sued the defendant insurance company for the recovery of money after the policy matured. The defendant filed a cross-action alleging mutual mistake in the writing of the policy, in that, through inadvertence, the figure of "$2,000." had been inserted instead of "$1,000.". There was no jury trial; the court tried the reformation issue raised by the cross-action, found that a mutual mistake had been made, and allowed the necessary correction.

In the *Williams Manufacturing Company* case, an action at law was prosecuted upon a fire insurance policy insuring a veneer mill. The defendant insurance company pleaded the general issue, and under that plea sought to show that the parties had intended to insure another mill located in the same town. But the Vermont court held there could be no correction of the policy in the law action, and said:

> "* * * The contract which the parties executed insured the veneer mill; the contract they intended

> to make is, in the circumstances, of no consequence. If the parties intended to insure the sawmill, and there is much in the case to indicate they did, the policy cannot be corrected in this suit. As the policy now is, there is nothing for the court to do, but enforce the contract as it reads. * * *".

In *General Accident Fire and Life Insurance Company v. Owen Building Company*, 195 Mo. App. 371, 192 S.W. 145 (1917), there was an action by an insurance company to recover premiums upon certain policies. The defendant attempted to prove at the trial that the contract for the payment of the premiums was different from that stated in the policies. This testimony was objected to by plaintiff on the ground that it would contradict the written contract. The appellate court held that the trial court correctly excluded the evidence offered to change the meaning of the written contract, and quoted at length from the opinion of this Court in *Union Mutual Life Insurance Company v. Mowry, supra.*

And for similar applications of the parol evidence rule, see the following: *Van Syckel v. Dalrymple*, 32 N.J. Eq. 233 (1880); *Ewer v. Washington Insurance Company*, 16 Pickering 502 (1835); *Holmes v. Charlestown Insurance Company*, 10 Metcalf 211 (1845); and *New York, New Haven, etc. v. Preferred Underwriters*, 252 Mass. 1, 146 N.E. 905 (1925).

THE WEST VIRGINIA CASES

The right of petitioner to a jury trial is to be determined by Federal law, rather than state law: *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62 (CCA 3, 1943). Nevertheless, we cannot pass by unchallenged the contention made in petitioner's briefs that in West Virginia, at common law, a litigant

could defend against an action upon a written instrument by contending there was a mutual mistake in its terms. No West Virginia case cited by petitioner furnishes support for any such argument, and in fact the rule is just to the contrary.

In a law action, the West Virginia court has always accorded a written agreement the integrity which the parol evidence rule requires. For example, in *Hurst v. Hurst*, 7 W. Va. 289 (1874), an action at law was prosecuted to recover possession of real estate. At the trial, the defendant relied upon an alleged mutual mistake in the writing of the deed in qustion, asserting that by mistake it reserved a life estate to the grantor, whereas the intention had been to convey in fee simple title without any reservation. The West Virginia court held that such evidence was not admissible to impeach the deed in a law action.

In *Camden v. McCoy*, 48 W. Va. 377 (1900), and in *Buena Vista Company v. Billmyer*, 48 W. Va. 382 (1900), defendants in actions at law upon written contracts attempted to invoke parol evidence to modify the terms of the contracts. In both cases, the West Virginia court held that such evidence could not be received in the law actions.

And in *Knowlton v. Campbell*, 48 W. Va. 294, 296 (1900), the court in discussing relief against a mistake made in a written contract, said:

> "If it was intended that it should do so, there is a mistake in that contract. Suppose there is and that the contract does not say what it was intended it should say. Then it can be corrected only in equity, and cannot be affected upon a trial in an

action at law. "Courts of law act on the contracts of parties as they find them, and have no power to rectify a mistake not apparent upon the face of the instrument. Such relief is purely within the province of equity courts." 14 Ency. Pl. & Prac. 35. "A court of equity may reform a written contract where a suit is brought for the purpose, and it is alleged that by fraud, accident or mistake of the scribe, or by some other means the real agreement of the parties was not that which is expressed in such written agreement; but except when such a suit as this is brought, no parol evidence can be introduced to explain, alter or modify in any manner a written agreement." No verbal declarations or understanding of the parties at the time of the contract can be admitted."

3. Right to Jury Trial of an Equitable Issue is not Created by Statutes or Rules Permitting Pleading of Such Issue in Law Action.

The Seventh Amendment to the Constitution guarantees to a litigant a jury trial of those issues only which, as the practice stood at the time of the adoption of the Amendment, were recognized as legal issues triable by a jury, as distinguished from equitable issues triable by the chancellor: *Liberty Oil Company v Condon National Bank*, 260 U.S. 235 (1922). And statutory authority to plead equitable defenses in an action at law in the Federal Courts did not extend the right of jury trial to the issues presented by such defenses. By the Act of March 3, 1915, constituting Section 274 (b) of the Judicial Code,* the pleading of equitable defenses in law actions was authorized:

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* 28 *U.S.C.A.* 398.

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. * * *".

However, this Court has consistently held that any equitable defenses so pleaded were to be tried by the chancellor, and not by a jury. In *Liberty Oil Company v. Condon National Bank, supra,* at pages 242-3, this Court said:

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury. * * * The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. * * * This was the practice in the courts of law and chancery in England when our Constitution and the 7th Amendment were adopted, and it is in the light of such practice that the 7th Amendment is to be construed."

In *Enelow v New York Life Insurance Company,* 293 U.S. 379, 382 (1935), on which petitioner places great reliance, this Court said:

"When the Congress enacted § 274 (b) of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the

substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law 'by answer, plea, or replication without the necessity of filing a bill on the equity side of the court'. The defendant is to have 'the same rights' as if he had filed a bill seeking the same relief. The equitable issue 'is to be tried to the judge as a chancellor'. The same order of trial is preserved as under the system of separate courts. *Liberty Oil Co. v. Condon Bank,* 260 U.S. 235, 242, 243, 67 L. Ed. 232, 234, 236, 43 S. Ct. 118. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. * * *".

Nor did the adoption of the new Federal Rules of Civil Procedure enlarge the right to jury trial. The enabling Act of June 19, 1934, 48 Stat. 1064, 28 *U.S.C.A.* 723b, which initiated the movement for the new Rules, itself provided that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; and the courts are in accord that the Federal Rules were never intended either to enlarge or restrict the right to a jury trial.* In *Ettelson v. Metropolitan*

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* The new Federal Judicial Code, effective September 1, 1948, contains the following provision regarding rules of civil procedure (28 *U.S.C.A.* 2072):

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Life Insurance Company, 137 F. (2d) 62, 65 (CCA 3, 1943), the Court said:

> "* * * Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. * * *".

To the same effect are: *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37 (D.C., Mass., 1939); *Bynum v. Prudential Insurance Company,* 7 F.R.D. 585 (E.D., S. C., 1947); *Logan v. Holman,* 7 F.R.D. 596 (D.C., N. J., 1947).

Rule 38(b) of the Federal Rules of Civil Procedure merely provides that a party may demand trial by jury "of any issue triable of right by a jury". There was no intention of giving the litigants an absolute right to jury trial except where they were entitled to that right under the Seventh Amendment.

Petitioner apparently conceives that, under the new Rules, respondent would have an "adequate remedy at law", because the defense of mutual mistake might be asserted in an answer filed in the one form of civil action for which the Rules provide. But the opportunity to plead an *equitable* defense under the new Rules does not accord to the parties the constitutional right to have such defense tried by a jury. If that theory were adopted, *all* issues pleaded defensively under the new

Rules would have to be tried by a jury, if either litigant demanded it.

The case of *Susquehanna Company v. Anderson*, 239 N. Y. 285, 146 N.E. 381 (1925), contains a significant discussion by Judge Cardozo on the subject of jury trial of an equitable defense. There the plaintiff sued for recovery of money upon a written contract. Without definitely pleading a counterclaim, the defendant sought to defend on the ground that, due to mistake, the writing was not a true expression of the intent of the parties. The trial court excluded the defendant's evidence regarding the alleged mistake, because a counterclaim for reformation had not been specifically pleaded. The Court of Appeals reversed, holding that the *equitable* defense of mistake was available to the defendant under Section 262 of the New York Civil Practice Act, even in the absence of a counterclaim. Judge Cardozo then discussed the question of whether this equitable defense in the nature of reformation should be tried by a jury or by the court. His conclusion was that a New York statute applicable to actions for the recovery of money expressly required the trial to be by jury; but at the same time he pointed out that a different procedure was followed in the Federal Courts. Judge Cardozo said (146 N.E. 384-5):

> "There remains for consideration the manner of the trial. Our statute provides that in an action for money only 'an issue of fact must be tried by a jury unless a jury trial is waived or a reference is directed.' Civ. Prac. Act. § 425; Code Civ. Pro. § 968. * * * There is no distinction in this respect between kinds of defenses, dependent upon their origin in equity or at law. The distinction is be-

tween all defenses on the one side and counterclaims on the other. Civ. Prac. Act § 424; Code Civ. Pro. § 974. The rule is settled under these provisions that equitable defenses are triable in the same way as defenses that are legal. * * * Possibly, though this is far from clear, a different construction might have been given to the statute in its beginnings. *The question was one not of constitutional privilege, but of the meaning of legislation. The Federal Courts have found it possible in construing the provisions of the Judicial Code (U. S. Comp. St. § 968 et seq.) to reserve to the judge the trial of equitable defenses while leaving the legal issues to the verdict of the jury.* Plews v. Burrage (CCA) 274 F. 881; Susquehanna Coal Co. v. Pratt & Young (CCA) 276 F. 919, 920; Union Pac. R. Co. v. Syas, 246 F. 561, 158 C.C.A. 531; cf. Liberty Oil Co. v. Condon Nat. Bank, 260 U.S. 235, 242, 43 S. Ct. 118, 67 L. Ed. 232; Nat. Aniline Co. v. Arnhold (D.C.) 298 F. 755; Lestrade v. Barth, 19 Cal. 671. Those provisions, however, when they are compared with the provisions of our statute, will be seen to be essentially different, though to some extent analogous. We are committed to another holding, not only by the reported precedents, but by the consistent practice of trial judges extending over many years. * * *". (Italics ours.)

Later in the same opinion, Judge Cardozo commented on the fact that an issue of mutual mistake, which sought a change in the terms of a written contract, would be somewhat confusing for a jury to handle. He said:

"Very likely there is danger of confusion and injustice at times in this blending of the issue.

Juries may find it difficult to apply the presumption that preliminary treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake."

In effect, what Judge Cardozo pointed out in the above-quoted excerpts from his opinion was that, if the case before him, involving a mutual mistake or reformation defense in an action for the recovery of money on a written contract, had been in the Federal Court, rather than in a state court where the New York statute on jury trials controlled, the issue would be tried by the court and not by a jury. In such conclusion, we think he was clearly right.

II.

SINCE THE EQUITABLE ISSUE OF MUTUAL MISTAKE, RATHER THAN A LEGAL ISSUE, WAS INVOLVED, THE DISTRICT COURT'S ORDER FOR TRIAL OF SUCH ISSUE BY THE COURT SHOULD NOT BE INTERPRETED AS AN "INJUNCTION" ORDER APPEALABLE UNDER THE DOCTRINE OF ENELOW V. NEW YORK LIFE INSURANCE COMPANY, 293 U.S. 379 (1935) AND KINDRED CASES.

Petitioner relies upon *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935); *Adamos v. New York Life Insurance Company*, 293 U.S. 386 (1935); and *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 (1942). All of those cases followed the same procedural pattern: actions were instituted for recovery upon life insurance policies following the death of the insureds; by way of defense, the life insurance companies, relying upon alleged fraud in the applications for the policies, sought cancellation; and the District Courts ruled that the issue of fraud thus raised should be tried by the court without a jury, in advance of any trial of

the actions on the policies. This Court held that, in such procedural situation, an order directing trial of the fraud issue by the court, and postponing trial of the actions upon the policies, was equivalent to an "injunction," and therefore appealable under Section 129 of the Judicial Code.

But we think the present case is clearly distinguishable from those cases. Here, the *equitable* issue of mutual mistake in memorializing the agreement of the parties, and not the *legal* issue of fraud, is involved. Fraud has always been regarded as a defense pleadable at law against the enforcement of a contract. On the contrary, mutual mistake could not, in the absence of statutory authorization, be interposed as a defense to a law action on the written instrument; and even when pleaded under a statute, it would not lose its equitable character.

The clear distinction between the challenge to a written instrument for correction of mutual mistake, and a challenge under the guise of "cancellation" but based upon the legal defense of fraud, was aptly pointed out by Judge Parker in the opinion of the Court of Appeals in the present case:

> "* * * The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co. v. Saxe*, App. D.C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy

at law, *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties." (R. 29).

It is significant that after the *Ettelson* case went back to the Circuit Court of Appeals for the Third Circuit for a decision on the merits, that Court explored, as the decisive test for or against a jury trial, the question of whether fraud was historically available to the insurer as a legal defense to an action at law. The Court of Appeals stated its conclusion in *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62, 65-6 (CCA 3, 1943)*:

"* * * We find federal decisions going back for more than one hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy.

* * * * * * *

"The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since."

We have no quarrel with the doctrine of the *Enelow* case as applied to the trial of the *legal* issue of fraud, although it may be pointed out that the appealability rule there enunciated has been viewed elsewhere with

* Certiorari denied: 320 U.S. 777 (1943).

some misgiving:* *Beaunit Mills v. Eday Fabric Sales Corporation,* 124 F. (2d) 563, 565 (CCA 2, 1942); 3 *Moore's Federal Practice, 1947 Supplement,* pages 33-5; and 55 *Harvard Law Review* 861. But we do submit that this rule of appealability should not be further extended to apply to a case, like the present one, where the District Court, in litigation embodying no disputed legal issue, merely ordered the sole *equitable* issue to be tried by the court without a jury.

As Judge Parker said in the present case:

> "Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing the course of litigation. * * *". (R. 30).

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* Judge Clark, who wrote the opinion in the *Beaunit Mills* case, *supra,* was the Reporter of the Advisory Committee which drafted the new Federal Rules of Civil Procedure; and Judge Dobie, who also served on the Advisory Committee, sat on the present case in the Court of Appeals below and concurred in the opinion dismissing the appeal.

III.

PETITIONER'S APPEAL WAS DISMISSIBLE BECAUSE, AS THE COURT OF APPEALS SAID, IN COMPLAINING OF AN ORDER FOR NON-JURY TRIAL OF AN EQUITABLE ISSUE THE APPEAL PRESENTED NO QUESTION OF SUBSTANCE.

Aside from the technical question of appealability under the doctrine of the *Enelow* case, the dismissal of the appeal by the Court of Appeals was right on the further ground that no question of substance was presented. As was pointed out by Judge Clark in *Ring v. Spina,* 166 F (2d) 546, 549 (CCA 2, 1948), the decision on the merits upon an appeal of this type is "inextricably intertwined with that of appealability". The Court of Appeals below thought petitioner's appeal was dismissible for lack of substance; Judge Parker said:

> "And even if the order allowing* jury trial were appealable, the motion to dismiss might well be allowed on the ground that the appeal presents no question of substance." (R. 30).

This court has said that though, in form, a reviewable question may be presented on the record, it will not be heard if it is so wholly wanting in merit as to be unsubstantial: *Brolan v. United States,* 236 U. S. 216, 218 (1915); *United States v. Lane,* 232 U. S. 598, 600 (1914).

As already pointed out, the issue for trial here in the District Court was not, as it was in the *Enelow, Adamos* and *Ettelson* cases, *supra,* the question of whether fraud on the part of the plaintiff vitiated the

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* It seems obvious that the word "allowing" was inadvertently used by the court here in place of "disallowing" or "denying".

written contract sued upon. The issue here was mutual mistake, under which it was necessary for respondent to show that the written contract did not correctly set forth the actual agreement of the parties. This has always been and still is an *equitable* issue, whether asserted in an action for reformation, or as a defense to an action on the contract as written. As Judge Parker aptly said in the court below:

> "The only issue in the case is the issue of mutual mistake. * * *
>
> "* * * No distinction exists between reforming the policy as a basis of suit and reforming it for the assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written and parol evidence to add to, alter or deny its terms is not admissible. * * *." (R. 29).

While, under modern procedural devices, mutual mistake invoked to correct a written instrument may now be pleaded as a defense to an action on the instrument, rather than in an independent equity suit for reformation, the issue thus raised does not lose its equitable character, and is to be tried by the court without a jury. See: *Philippine Sugar Estates Development Company v. Philippines*, 247 U.S. 385, 388-9 (1918); *Donnelly v. Northwestern Life Insurance Company*, 59 F. (2d) 46 (CCA 5, 1932); and *Upson Nut Company v. American Shipbuilding Company*, 251 Fed. 707 (N.D., Ohio, 1918). In the *Philippines* case, *supra*, this Court said:

> "The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in

effect, a bill in equity for reformation, and incidentally to enjoin the action at law. * * * The proceeding became thus an equitable one. * * * The proper method of review by this court is, therefore, by appeal; and the writ of error is dismissed."

As this court said in *Liberty Oil Company v. Condon National Bank,* 260 U.S. 235, 242-3 (1922):

"The equitable defense makes the issue equitable and is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law."

Hence, it is conceived that the Court of Appeals was correct in saying that "the appeal presents no question of substance". (R. 30).

For the foregoing reasons, it is respectfully submitted that the Court of Appeals did not err in dismissing petitioner's appeal, and that its judgment should be affirmed.

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